ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

DESKBOOK 2016

Federal Litigation

The Judge Advocate General's Legal Center and School

United States Army

Federal Litigation

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FEDERAL LITIGATION COURSE

TAB A

CASE MANAGEMENT AND RESPONSIBILITIES FOR LITIGATION

I. INTRODUCTION

II. RESPONSIBILITIES FOR LITIGATION

A. United States Department of Justice

1. Mission:

To enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.

2. Statutory Authority:

a) "Except as otherwise authorized by law, the conduct of litigation in which the United States, any agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to the officers of the Department of Justice, under the direction of the Attorney General." **28 U.S.C. § 516.**

b) "Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States Attorneys, assistant United States Attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties**."** **.**

3. Organization of the Department of Justice

There are 42 separate components of the Department. These include the United States Attorneys, who prosecute offenders and represent the United States Government in court; the National Security Division, which coordinates the Department's highest priority of combating terrorism and protecting national security the major investigative agencies – the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Bureau of Alcohol, Tobacco, Firearms and Explosives – which prevent and deter crime and arrest criminal suspects; the United States Marshals Service, which protects the federal judiciary, apprehends fugitives, and detains persons in federal custody; and the Federal Bureau of Prisons, which confines convicted offenders. The litigating divisions enforce federal criminal and civil laws, including civil rights, tax, antitrust, environmental, and civil justice statutes. The Office of Justice Programs and the Office of Community Oriented Policing Services provide assistance to state, tribal, and local governments. Other departmental components include the National Drug Intelligence Center, the Executive Office for United States Trustees, the Justice Management Division, the Executive Office for Immigration Review, the Community Relations Service, and the Office of the Inspector General. Although headquartered in Washington, D.C., the Department conducts much of its work in offices located throughout the country and overseas.

B. Civil Division

1. Mission:

The Civil Division represents the United States in any civil or criminal matter within its scope of responsibility – protecting the United States Treasury, ensuring that the federal government speaks with one voice in its view of the law, preserving the intent of Congress, and advancing the credibility of the government before the courts.

2. Major functions:

a) Defend or assert the laws, programs, and policies of the United States, including defending new laws implementing the President's domestic and foreign agenda against constitutional challenges.

b) Recover monies owed to the United States and victims as the result of fraud, loan default, bankruptcy, injury, damage to federal property, violation of consumer laws, or unsatisfied judgments.

c) Defend the interests of the U.S. Treasury, prevailing against unwarranted monetary claims, while resolving fairly those claims with merit.

d) Fight terrorism through litigation to detain and remove alien terrorists; defend immigration laws and policies, including determinations to expel criminal aliens.

e) Enforce consumer protection laws and defend agency policies affecting public health and safety.

f) Defend the government and its officers and employees in lawsuits seeking damages from the U.S. Treasury or from individuals personally.

g) Implement compensation programs, such as the Childhood Vaccine and Radiation Exposure programs; support viable alternatives to litigation when appropriate.

h) Represent the United States in foreign courts through foreign counsel supervised and instructed by attorney staff in Washington and London.

i) Represent the interests of the United States in civil and criminal litigation in foreign courts.

3. Components

a) Appellate Staff

(1) Responsible for the appellate work of the entire Civil Division

(2) Handles the many cases that are appealed directly from administrative agencies to the courts of appeals

(3) Attorneys on the Staff draft briefs and argue cases in the courts of appeals. In addition, each attorney participates in drafting various documents for the United States Supreme Court, including petitions for certiorari and briefs on the merits.

(4) Typical Appellate Staff cases include defending against constitutional challenges to Acts of Congress, Executive decisions, and national security programs; administrative challenges to agency rules and adjudications; tort claims against the United States; employment discrimination claims against the government; and claims against federal officers in their individual capacities for the alleged violation of a person's constitutional rights (*Bivens* claims).

b) Commercial Litigation Branch

(1) Attorneys work in one of six major areas: Corporate and Financial Litigation, the Office of Foreign Litigation, the Fraud Section; Intellectual Property, and the National Courts. A section oversees each area.

(2) Handles cases that involve billions of dollars in claims both by and against the government.

c) Federal Programs Branch

(1) The Branch litigates on behalf of approximately 100 federal agencies, the President and Cabinet officers, and other government officials.

(2) Activities in the Federal Programs Branch include the defense against constitutional challenges to federal statutes, suits to overturn government policies and programs, and attacks on the legality of government decisions. The Federal Programs Branch also initiates litigation to enforce regulatory statutes and to remedy statutory and regulatory violations.

d) Torts Branch

(1) The Torts Branch represents the interests of the United States in suits where monetary judgments are sought for damages resulting from negligent or wrongful acts. The Branch also handles actions involving injury or damage to government property.

(2) Four sections handle the Torts Branch's major practice areas: the Aviation and Admiralty Section; the Environmental Tort Litigation Section; the Federal Tort Claims Act Litigation Section; and the Constitutional and Specialized Torts Litigation Section.

e) The Consumer Protection Branch (CPB)

(1) CPB enforces and defends the consumer protection programs of four client agencies: the Food and Drug Administration (FDA), the Federal Trade Commission (FTC), the Consumer Product Safety Commission, and the Department of Transportation's National Highway Traffic Safety Administration.

(2) By regulation, 28 C.F.R. § 0.45(j), CPB is responsible for litigation under the principal Federal consumer protection laws these agencies enforce. These laws include the Federal Food, Drug, and Cosmetic Act; the odometer tampering prohibitions of the Motor Vehicle Information and Cost Savings Act; the Consumer Product Safety Act; and a variety of laws administered by the FTC, such as the Fair Debt Collection Practices Act.

f) Office of Immigration Litigation

(1) The Office of Immigration Litigation oversees all civil immigration litigation, both affirmative and defensive, and is responsible for coordinating national immigration matters before the federal district courts and circuit courts of appeals.

(2) This office provides support and counsel to all federal agencies involved in alien admission, regulation, and removal under U.S. immigration and nationality statutes. Office of Immigration Litigation attorneys work closely with United States Attorneys' Offices on immigration cases. The Office of Immigration Litigation is divided into two functional sections, an Appellate Section and a District Court Section. United States Attorneys

4. Mission:

The United States Attorneys serve as the nation's principal litigators under the direction of the Attorney General.

5. Statutory Authority:

a) One United States Attorney appointed by the President for each judicial district. **28 U.S.C. § 541.**

b) Assistant United States Attorneys (AUSA) are appointed by the Attorney General. **28 U.S.C. § 542.**

c) "[E]ach United States Attorney, within his district, shall . . . (2) prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned." **28 U.S.C. § 547.**

6. Organization of the United States Attorney's Office

a) There are 93 United States Attorneys stationed throughout the United States, Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands.

b) One United States Attorney is assigned to each of the judicial districts, with the exception of Guam and the Northern Mariana Islands where a single United States Attorney serves in both districts.

c) Each United States Attorney is the chief federal law enforcement officer of the United States within his or her particular jurisdiction.

C. Attorneys at Army Activities or Commands (AR 27-40, para. 1-4)

III. CASE MANAGEMENT

A. Federal Rules of Civil Procedure

1. Scope and Purpose

"These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

2. Civil Litigation Timeline

a) Commencing an Action - Fed. R. Civ. P. 3 - 6

b) Pleadings and Motions - Fed. R. Civ. P. 7 – 16

- Scheduling Orders (Rule 16(b))

c) Disclosures and Discovery - Fed. R. Civ. P. 26 – 37

- Discovery Planning Conference (Rule 26(f))

d) Trials - Fed. R. Civ. P. 38 – 53

e) Judgment - Fed. R. Civ. P. 54 – 63

B. Agency Counsel

1. Read Complaint/Summons
2. Determine Filing Date
3. Check Service Date (120 days from filing)
4. Check Proper Service
   a) Rule 4(i)
   b) AR 27-40, Chapter 2
5. Determine Answer Due Date (usually 60 days from Service, if waived)
6. Determine whether the case should be delegated or removed
7. Prepare a litigation report (AR 27-40, para. 3-9)
8. Contact "local counsel" to discuss case
9. Determine whether the case could have a special interest. If so, coordinate with OGC
10. Examine lit report looking for bases for a MTD and affirmative defenses. Ensure lit report is forwarded to the AUSA
11. Coordinate with AUSA or DOJ
    a) Litigation Report, background issues, and possible delays
    b) Discovery (e.g. litigation holds, e-discovery issues)

c) Drafting an Answer or MTD

IV. CONCLUSION

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

JENNIFER NORRIS, Individually, and as Parent and Legal Guardian of DYLAN NORRIS, et al.,

Plaintiffs,

v. **Case No. 2:03-CV-563-FTM-29SPC**

UNITED STATES OF AMERICA,

Defendant.
_____/

Case Management Report

The parties have agreed on the following dates and discovery plan pursuant to Fed.R.Civ.P. 26(f) and Local Rule 3.05(c):

DEADLINE OR EVENT		AGREED DATE
Certificate of Interested Persons and Corporate Disclosure Statement		Filed.
Motions to Add Parties or to Amend Pleadings		3/19/13
Disclosure of Expert Reports	Plaintiff: Defendant:	7/16/13 10/15/13
Discovery Deadline	Fact: Expert:	1/19/14 3/18/14
Dispositive Motions, *Daubert,* and *Markman* Motions		7/1/14

DEADLINE OR EVENT		AGREED DATE
Meeting *In Person* to Prepare Joint Final Pretrial Statement		8/29/14
Joint Final Pretrial Statement		9/16/14
All Other Motions Including Motions *In Limine*, Trial Briefs		10/3/14
Final Pretrial Conference		10/3/14
Trial Term Begins		11/1/14
Estimated Length of Trial		10 Days
Jury / Non-Jury		Non-Jury
Mediation	Deadline: Mediator: Address: Telephone:	8/5/14 TBD
All Parties Consent to Proceed Before Magistrate Judge		Yes: No: X Likely to Agree:

I. Meeting of Parties.

Pursuant to Local Rule 3.05(c)(2)(B) or (c)(3)(A), a meeting was held on January 15, 2013, at 1:30 p.m., and was attended in person by:

Name	Counsel For
Ann Frank	Plaintiffs
Mark Steinbeck	United States of America

Counsel for Plaintiffs subsequently met with Kenneth M. Oliver, counsel for the State of Florida, who concurred with the scheduling matters reflected herein.

II. Pre-Discovery Initial Disclosures of Core Information.

A. Fed.R.Civ.P. 26(a)(1)(C) - (D) Disclosures.

The parties agree to exchange information described in Fed.R.Civ.P. 26(a)(1)(C) - (D) by February 27, 2013.

Below is a description of information disclosed or scheduled for disclosure.

Plaintiff's statement of damages.

B. Fed.R.Civ.P. 26(a)(1)(A) - (B) Disclosures.

The parties agree to exchange information referenced by Fed.R.Civ.P. 26(a)(1)(A) - (B) by February 27, 2013.

Below is a description of information disclosed or scheduled for disclosure.

Information required by Rule 26(a)(1)(A) & (B).

III. Agreed Discovery Plan for Plaintiffs and Defendants.

A. Certificate of Interested Persons and Corporate Disclosure Statement.

This Court has previously ordered each party, governmental party, intervenor, non-party movant, and Rule 69 garnishee to file and serve a Certificate of Interested Persons and Corporate Disclosure Statement using a mandatory form. No party may seek discovery

from any source before filing and serving a Certificate of Interested Persons and Corporate Disclosure Statement. A motion, memorandum, response, or other paper — including emergency motion — is subject to being denied or stricken unless the filing party has previously filed and served its Certificate of Interested Persons and Corporate Disclosure Statement. Any party who has not already filed and served the required certificate is required to do so immediately.

Every party that has appeared in this action to date has filed and served a Certificate of Interested Persons and Corporate Disclosure Statement, which remains current:

Yes: X

No:

Amended Certificate will be filed by_____(party) on or before _____ (date).

B. Discovery Not Filed.

The parties will not file discovery materials with the Clerk except as provided in Local Rule 3.03. The Court encourages the exchange of discovery requests on diskette. *See* Local Rule 3.03 (f). The parties further agree as follows: NA.

C. Limits on Discovery.

Absent leave of Court, the parties may take no more than ten depositions per side (not per party). Fed.R.Civ.P. 30(a)(2)(A); Fed.R.Civ.P. 31(a)(2)(A); Local Rule 3.02(b). Absent leave of Court, the parties may serve no more than twenty-five interrogatories, including sub-parts. Fed.R.Civ.P. 33(a); Local Rule 3.03(a). The parties may agree by stipulation on other limits on discovery. The Court will consider the parties' agreed dates, deadlines, and other limits in entering the scheduling order. Fed.R.Civ.P. 29. In addition to the deadlines in the above table, the parties have agreed to further limit discovery as follows:

1. Depositions. **The parties request leave of Court to take no more than 15 depositions per side based on the nature of the claims in this matter creating the probability that each side will have 4 or more experts and on the number of individual parties and medical providers.**

2. Interrogatories. **The parties request leave of Court to propound no more than 50 interrogatories per side based on the nature of the**

claims in this matter creating the probability that each side will have 4 or more experts and on the number of individual parties and medical providers.

3. Document Requests. NA.

4. Requests to Admit. NA.

5. Supplementation of Discovery. NA.

D. Discovery Deadline.

Each party shall timely serve discovery requests so that the rules allow for a response prior to the discovery deadline. The Court may deny as untimely all motions to compel filed after the discovery deadline. In addition, the parties agree as follows: **to split discovery deadlines to allow expert opinion discovery to be conducted after conclusion of fact discovery, in an effort to make unnecessary the taking of supplemental depositions of expert witnesses.**

E. Disclosure of Expert Testimony.

On or before the dates set forth in the above table for the disclosure of expert reports, the parties agree to fully comply with Fed.R.Civ.P. 26(a)(2) and 26(e). Expert testimony on direct examination at trial will be limited to the opinions, basis, reasons, data, and other information disclosed in the written expert report disclosed pursuant to this order. Failure to disclose such information may result in the exclusion of all or part of the testimony of the expert witness. The parties agree on the following additional matters pertaining to the disclosure of expert testimony: NA.

F. Confidentiality Agreements.

Whether documents filed in a case may be filed under seal is a separate issue from whether the parties may agree that produced documents are confidential. The Court is a public forum, and disfavors motions to file under seal. The Court will permit the parties to file documents under seal only upon a finding of extraordinary circumstances and particularized need. *See Brown v. Advantage Engineering, Inc.*, 960 F.2d 1013 (11th Cir. 1992); *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985). A party seeking to file a document under seal must file a motion to file under seal requesting such Court action, together with a memorandum of law in support. The motion, whether

granted or denied, will remain in the public record.

The parties may reach their own agreement regarding the designation of materials as "confidential." There is no need for the Court to endorse the confidentiality agreement. The Court discourages unnecessary stipulated motions for a protective order. The Court will enforce appropriate stipulated and signed confidentiality agreements. *See* Local Rule 4.15. Each confidentiality agreement or order shall provide, or shall be deemed to provide, that "no party shall file a document under seal without first having obtained an order granting leave to file under seal on a showing of particularized need." With respect to confidentiality agreements, the parties agree as follows: NA.

G. Other Matters Regarding Discovery. NA.

IV. Settlement and Alternative Dispute Resolution.

A. Settlement.

The parties agree that settlement prior to completion of discovery is:

____ likely X unlikely.

The parties request a settlement conference before a U.S. Magistrate Judge.

_____yes X no ____likely to request in future

B. Arbitration.

Local Rule 8.02(a) defines those civil cases that will be referred to arbitration automatically. Does this case fall within the scope of Local Rule 8.02(a)?

_____yes X no

For cases **not** falling within the scope of Local Rule 8.02(a), the parties consent to arbitration pursuant to Local Rules 8.02(a)(3) and 8.05(b):

_____yes X no ____likely to agree in future

_____ Binding _____Non-Binding

In any civil case subject to arbitration, the Court may substitute mediation for arbitration upon a determination that the case is susceptible to resolution through mediation. Local

Rule 8.02(b). The parties agree that this case is susceptible to resolution through mediation, and therefore jointly request mediation in place of arbitration:

__X__ yes ____ no ____ likely to agree in future

C. Mediation.

The parties agree to mediate this matter and to use a mediator from the Court's approved list. The parties agree to the date stated in the table above as the last date for mediation.

D. Other Alternative Dispute Resolution. NA

Date: _____

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United States Attorney

By: _____
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Date: _____

_____
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Counsel for Plaintiffs

Date: _____ _____

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Counsel for the State of Florida

LITIGATION TIME LINE

DAYS	LITIGATION EVENT
0	COMPLAINT (Rule 3)
120	SERVICE (Rule 4(m) – no later than 120 days after Filing of Complaint)
180	DEFENDANT RESPONSE - ANSWER or MOTIONSTO DISMISS (Rule 12 – within 21 days or no later than 60 days after the request for waiver was sent)
219	DISCOVERY CONFERENCE (Rule 26(f) – ASAP or Minimum 21 days before Scheduling Order).
233	INITIAL MANDATORY DISCLOSURES (Rule 26(a)(1)- no later than 14 days after Rule 26(f) Conference)
240	SCHEDULING CONFERENCE AND ORDER (Rule 16(b) – Issued 120 days after Complaint is served. Time Line assumes Court sets Trial in six months).
241	DISCOVERY (Rules 26 - 37 – Time period varies)
330	DISCLOSURE OF EXPERTS (Rule 26(a)(2)(D)(i) – 90 days before trial).
360	DISPOSITIVE MOTIONS(Rule 56- Timing varies)
390	PRETRIAL DISCLOSURES OF WITNESSES AND EXHIBITS (Rule 26(a)(3) – 30 days before trial)
404	OBJECTIONS TO ADMISSABILITY OF WITNESSES AND EXHIBITS (Rule 26(a)(3) – w/in 14 days or waived without showing of "good cause.")
420	TRIAL

FEDERAL LITIGATION COURSE

TAB B-I

SYSTEMIC ANALYSIS OF CASES IN FEDERAL LITIGATION

Overview

I. INTRODUCTION.

A. Military decisions, programs, and policies are subject to review by the federal courts.

B. Themes common to litigation against the military departments:

1. Suits almost exclusively in the federal courts.

2. Suits are generally filed against a federal agency.

3. The military and its officials are involved.

II. METHOD OF ANALYSIS

A. Case management and responsibility.

B. Department of Justice representation and removal of case to federal court.

C. Power of the federal court to decide case: Does the federal court have jurisdiction?

1. Grants of jurisdiction.

a) Constitutional limits.

b) Statutory grants.

2. Justiciable case or controversy.

a) Adversarial.

(1) Advisory opinions.

(2) Ripeness.

(3) Mootness.

(4) Standing.

b) Political question.

D. Federal Remedies: Can the court award the relief demanded?

1. Sovereign immunity.

2. Types of remedies:

a) Money.

b) Mandamus.

c) Habeas corpus.

d) Injunctions.

e) Declaratory judgment.

E. Exhaustion of administrative remedies: Has the plaintiff pursued all intra-agency remedies?

1. Basic doctrine.

2. Remedies available.

3. Exceptions.

F. Reviewability: Should the court review and decide issues in controversy?

1. APA.

2. Mindes.

G. Scope of review: To what extent should the federal court substitute its judgment for that of the military decision-maker?

H. Official Immunity.

1. Constitutional Tort Lawsuit.

2. Common Law Tort Lawsuit.

III. CONCLUSION.

FEDERAL LITIGATION COURSE

TAB B-II

SYSTEMIC ANALYSIS OF CASES IN FEDERAL LITIGATION

Jurisdiction

I. FEDERAL JUDICIAL POWER.

A. General.

"The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority; -- to all Cases affecting Ambassadors, other Public Ministers and Consuls; -- to all Cases of admiralty and Maritime Jurisdiction; -- to Controversies to which the United States shall be a party; -- to Controversies between two or more States; -- between a State and Citizens of another State; -- between Citizens of different States; -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." -- U.S. Const. art. III, § 2.

B. Limited jurisdiction. See generally, Turner v. Bank of North America, 4 U.S. 8, 4 Dall. 8 (1799).

1. Subjects and Parties. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378 (1821). Superceded by statute as stated in Nicodemus v. Union Pacific Corp., 318 F.3d 1231 (10th Cir.(Wyo.) Feb 13, 2003), rehearing in banc granted (Apr 22, 2003).

2. Cases and Controversies -- Justiciability. Flast v. Cohen, 392 U.S. 83, 94-95 (1968) (discussing who has standing to file suit).

II. CONGRESSIONAL GRANTS OF JURISDICTION

A. General.

1. Except for Supreme Court's original jurisdiction derived directly from the Constitution, federal judicial power is dependent upon a statutory grant of jurisdiction. Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1922) (upholding "that where an action is one in rem that court whether state or federal which first acquires jurisdiction draws itself the exclusive authority to control and dispose of the res, involves the conclusion that the rights of the litigants to invoke the jurisdiction of the respective courts are of equal rank."); Goehring v. Harleysville Mut. Cas. Co., 460 Pa. 138, 145, 331 A.2d 457, 460 (1975);; See also, Stevenson v. Fain, 195 U.S. 165, 167 (1904); Mayor of Nashville v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1867)(superceded by statute as stated in Johns-Manville Corp. v. U.S., 893 F.2d 324 (Fed.Cir. Dec 28, 1989).

   a) Jurisdictional statute may be more restrictive than the Constitution. Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850).

   b) Jurisdictional statute may not exceed constitutional limits of jurisdiction. Hodgson & Thompson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809).

2. The burden of pleading and proving the subject-matter jurisdiction of the court is on the plaintiff. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182, 189 (1936).

3. The United States cannot be sued without its consent. United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Sherwood, 312 U.S. 584, 586 (1941).

4. See Selected Federal Statutes, D-III-1 to D-III-4.

B. Federal Question Jurisdiction: 28 U.S.C. § 1331.

1. The statute: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

2. Historical origins.

3. The meaning of "arising under federal law."

a) "[A]n action arises under federal law . . . if in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law -- whether that proposition is independently applicable or becomes so only by reference from state law." P. Bator, P. Mishkin, D. Shapiro, H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System, page 889 (3d ed. 1988). See Empire Healthchoice Assur., Inc. v. McVeigh, 547 U.S. 677 (2006)(a case "arises under federal law" if "a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.").

(1) Federal causes of action. American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916) (Holmes, J.) ("A suit arises under the law that creates the cause of action").

(2) Vindication of right under state law necessarily turns on some construction of federal law. Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921). Cf. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) (federal preemption).

(a) The mere presence of a federal issue in a state cause of action does not automatically confer federal question jurisdiction. Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 813 (1986); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983); Moore v. Chesapeake & Ohio Ry. Co., 291 U.S. 205 (1934).

(b) The federal question must be substantial and form an essential part of the cause of action. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983); Gully v. First Nat'l Bank, 299 U.S. 109 (1936); Smith v. Grimm, 534 F.2d 1346 (9th Cir.), cert. denied, 429 U.S. 980 (1976).

b) "Well-pleaded complaint" rule: In determining whether a case arises under federal law, a court generally is confined to the well-pleaded allegations of the plaintiff's complaint. Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 808 (1987); see also, Vaden v. Discover Bank, 556 U.S. 49, 60 (2009) "Under the longstanding well-pleaded complaint rule, however, a suit 'arises under' federal law 'only when the plaintiff's statement of his own cause of action shows that it is based upon [federal law].' Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152, (1908). Federal jurisdiction cannot be predicated on an actual or anticipated defense: 'It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of [federal law].' Id."; International Primate Protection League v. Administrators of Tulane Education Fund, 500 U.S. 72 (1991); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983).

(1) Federal question cannot simply be the basis of an anticipated defense. Oklahoma Tax Commission v. Graham, 489 U.S. 838 (1989); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908).

(2) In declaratory judgment action, federal question jurisdiction is lacking if the federal claim would arise only as a defense to a state created action. Amsouth Bank v. Dale, 386 F.3d 763, 775 (6th Cir. 2004).

(3) However, complete preemption provides a limited exception to the well pleaded complaint rule. That is "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987). See also Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, 545 U.S.308 (2005) (the meaning of a federal tax provision is an important federal law issue that supports federal question jurisdiction in this state quiet title action).

4. What constitutes federal law?

A. Constitution.

B. Statute.

C. Federal common law. Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

D. Executive regulations. Compare Farmer v. Philadelphia Elec. Co., 329 F.2d 3, 7-8 (3d Cir. 1964) (validly issued administrative regulations or orders may be treated as "laws of the United States") with Chaase v. Chasen, 595 F.2d 59 (1st Cir. 1979) (customs circular concerning employee overtime does not constitute one of the "laws of the United States") and Federal Land Bank v. Federal Intermediate Credit Bank, 727 F. Supp. 1055 (S.D. Miss. 1989) (financial directive by Farm Credit Administration not a "law of the United States").

E. Treaties. Compare Int'l Ins. Co. v. Caja Nacional De Ahorro Y Seguro, 293 F.3d 392 (7th Cir. 2002)(holding that Panama Convention provided independent federal question jurisdiction) with Chubb & Son, Inc. v. Asiana Airlines, 214 F. 3d 301 (2d Cir. 2000)(holding that court lacks subject matter jurisdiction in absence of treaty relationship between U.S. and South Korea).

5. Elimination of the amount in controversy requirement.

a. Pub. L. No. 94-574, 90 Stat. 2721 (1976) -- Lawsuits against the United States, any agency thereof, or any officer or employee in his or her official capacity.

b. Pub. L. No. 96-486, 94 Stat. 2369 (1980) -- All lawsuits.

6. Federal question jurisdiction statute does not waive the Government's sovereign immunity. See, e.g., Clinton County Com'rs v. U.S. Envtl. Protection Agency, 116 F.3d 1018, 1022 (3rd Cir. 1997); Gochnour v. Marsh, 754 F.2d 1137, 1138 (5th Cir.), cert. denied, 471 U.S. 1057 (1985); State of New Mexico v. Regan, 745 F.2d 1318 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985).

C. The Tucker Act. 28 U.S.C. §§ 1346(a)(2), 1491.

1. The statutes:

a. "The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of . . . [a]ny . . . civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . ." 28 U.S.C. § 1346(a)(2) ("Little Tucker Act").

b. "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages not sounding in tort. . . ." 28 U.S.C. § 1491(a)(1) ("Tucker Act").

c. Amendments conferring bid protest jurisdiction. 28 U.S.C. § 1491(b)(1) – (4), as modified by "sunset provision" for district court jurisdiction.

2. General.

a. Must be brought within 6 years of accrual of claim. 28 U.S.C. § 2501.

b. Monetary damages only in Court of Federal Claims (with exception of bid protests.)

c. Jurisdictional statute only; confers no substantive rights for plaintiff. In order to state a claim upon which relief may be granted, must demonstrate independent "money-mandating" basis for relief sought:

(1) Contract (must demonstrate all elements of enforceable contract.)

(2) Statute or regulation with mandatory provisions establishing entitlement to money (military/ civilian personnel claims).

(3) Constitution (Fifth Amendment takings claims heard by COFC).

(4) Not sounding in tort.

3. Concurrent jurisdiction of the district courts and the Court of Federal Claims.

a. Claims not exceeding $10,000: district courts and Court of Federal Claims have concurrent jurisdiction.

b. Claims exceeding $10,000: Court of Federal Claims has exclusive jurisdiction.

(1) The amount of a claim is the total amount of money the plaintiff ultimately stands to recover in the case. Smith v. Orr, 855 F.2d 1544 (Fed. Cir. 1988); Chabal v. Reagen, 822 F.2d 349 (3d Cir. 1987); Shaw v. Gwatney, 795 F.2d 1351 (8th Cir. 1986); Goble v. Marsh, 684 F.2d 12 (D.C. Cir. 1982).

-- Determined by the good-faith allegations of the plaintiff's complaint. Id. See also Zumerling v. Devine, 769 F.2d 745 (Fed. Cir. 1985).

(2) Transfer to Court of Federal Claims under 28 U.S.C. § 1631. State of New Mexico v. Regan, 745 F.2d 1318 (10th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); Keller v. MSPB, 679 F.2d 220 (11th Cir. 1982).

(3) Waiver of claims in excess of $10,000. Zumerling v. Devine, 769 F.2d 745 (Fed. Cir. 1985); Goble v. Marsh, 684 F.2d 12 (D.C. Cir. 1982); Lichtenfels v. Orr, 604 F. Supp. 271 (S.D. Ohio 1984).

c. Demands for monetary and nonmonetary relief: finding a Tucker Act Claim.

(1) General rules:

(a) The federal courts will look beyond the facial allegations of the complaint to determine what the plaintiff hopes to acquire from the lawsuit. E.g., Mitchell v. United States, 930 F.2d 893 (Fed. Cir. 1991); Amoco Prod. Co. v. Hodel, 815 F.2d 352 (5th Cir. 1987); Weeks Constr., Inc. v. Oglala Sioux Hsg. Auth., 797 F.2d 668 (8th Cir. 1986). But see Gower v. Lehman, 799 F.2d 925 (4th Cir. 1986) (court looked to nature of plaintiff's cause of action rather than relief requested).

(b) The plaintiff cannot hide a claim for money damages by couching the claim in equitable terms. E.g., Denton v. Schlesinger, 605 F.2d 484 (9th Cir. 1979); Polos v. United States, 556 F.2d 903 (8th Cir. 1977).

(c) Where equitable or declaratory claim serves a significant purpose independent of recovering money damages, it does not necessarily fall under the Tucker Act because it may later become the basis for a money judgment. Duke Power Co. v. Carolina Envt'l Study Group, 438 U.S. 59, 71 n.15 (1978); Hahn v. United States, 757 F.2d 581 (3d Cir. 1985); Giordano v. Roudebush, 617 F.2d 511 (8th Cir. 1980).

(d) A claim falls under the Tucker Act when the "prime objective" of the plaintiff's suit is nontort money damages from the United States. E.g., Fairview Township v. United States EPA, 773 F.2d 517 (3d Cir. 1985); United States v. City of Kansas City, 761 F.2d 605 (8th Cir. 1985); Powell v. Marsh, 560 F. Supp. 636 (D.D.C. 1983).

(2) Distinguishing damages from specific relief or equitable relief. See, Bowen v. Massachusetts, 487 U.S. 905 (1988) (monetary relief, other than damages, may be an incident to specific relief granted).

(3) Bifurcating the Tucker Act and nonmoney claims. Compare Shaw v. Gwatney, 795 F.2d 1351 (8th Cir. 1986); Hahn v. United States, 757 F.2d 581 (3d Cir. 1985), with Matthews v. United States, 810 F.2d 109 (6th Cir. 1987); Keller v. MSPB, 679 F.2d 220 (11th Cir. 1982).

4. The Tucker Act and substantive rights to relief. United States v. Testan, 424 U.S. 392 (1976). See also Murphy v. United States, 993 F.2d 871 (Fed. Cir. 1993); Commonwealth of Mass. v. Departmental Grant Appeals Bd., 815 F.2d 778 (1st Cir. 1987); Maryland Dep't of Human Resources v. Department of Health & Human Serv., 763 F.2d 1441 (D.C. Cir. 1985).

5. Appeal of Tucker Act cases.

a. General rule: Court of Appeals for the Federal Circuit has exclusive jurisdiction over all appeals where the district court's jurisdiction is based, in whole or in part, on the Tucker Act. 28 U.S.C. § 1295; United States v. Hohri, 482 U.S. 64 (1987); Professional Managers' Ass'n v. United States, 761 F.2d 740 (D.C. Cir. 1985); Parker v. King, 935 F.2d 1174 (11th Cir. 1991), cert. denied 112 S. Ct. 3055 (1992); Trayco Inc. v. United States, 967 F.2d 97 (4th Cir. 1992); Banks v. Garrett, 901 F.2d 1084 (Fed. Cir. 1990), cert. denied 498 U.S. 821 (1990); Sibley v. Ball, 924 F.2d 25 (1st Cir. 1991); Wronke v. Marsh, 767 F.2d 354 (7th Cir. 1985).

b. Exceptions:

(1) Tucker Act claim frivolous or exceeds the jurisdiction of the district court. Empire Kosher Poultry, Inc. v. Hallowell, 816 F.2d 907 (3d Cir. 1987); Shaw v. Gwatney, 795 F.2d 1351 (8th Cir. 1986); Van Drasek v. Lehman, 762 F.2d 1065 (D.C. Cir. 1985).

(2) Another statute independently confers jurisdiction. Van Drasek v. Lehman, 762 F.2d 1065 (D.C. Cir. 1985). But cf. Wronke v. Marsh, 767 F.2d 354 (7th Cir. 1985); Maier v. Orr, 754 F.2d 973 (Fed. Cir. 1985).

(3) Regional court of appeals has already decided the case. Squillacote v. United States, 747 F.2d 432 (7th Cir. 1984), cert. denied, 471 U.S. 1016 (1985). But see Professional Managers Ass'n v. United States, 761 F.2d 740 (D.C. Cir. 1985).

D. The Federal Tort Claims Act. 28 U.S.C. §§ 1346(b), 2671-2680.

1. The statute:

"[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injuries or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).

2. Jurisdictional prerequisites:

a. Administrative claim requirement. 28 U.S.C. § 2675; Lee v. United States, 980 F.2d 1337 (10th Cir. 1992); Avila v. INS, 731 F.2d 616 (9th Cir. 1984).

b. Statute of limitations. 28 U.S.C. § 2401; McNeil v. United States, 964 F.2d 647 (7th Cir. 1992), aff'd 113 S.Ct. 1980 (1993); Conn v. United States, 867 F.2d 916 (6th Cir. 1989); GAF Corp. v. United States, 818 F.2d 901 (D.C. Cir. 1987).

c. Strictly construed. Lee v. United States, 980 F.2d 1337 (10th Cir. 1992) (administrative claim requirement); Gould v. Dep't of Health and Human Services, 905 F.2d 738 (4th Cir 1990); NcNeil v. United States, 964 F.2d 647 (7th Cir 1992), aff'd, 508 U.S. 106 (1993).

3. Limitations.

a. Limited to the amount of the administrative claim. 28 U.S.C. § 2675(b). See Jackson v. United States, 730 F.2d 808, 810 (D.C. Cir. 1984).

b. Types of torts specifically excepted. 28 U.S.C. § 2680.

(1) Discretionary function.

(2) Intentional torts.

(3) Arising out of combatant activities.
(4) Arising in a foreign country.

c. State statutory limitations.

E. Mandamus. 28 U.S.C. § 1361.

1. The statute: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

2. Historical origins.

F. Habeas Corpus. 28 U.S.C. §§ 2241-2255.

1. The statute:

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .
. . .

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or any order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States."

-- 28 U.S.C. § 2241.

2. Jurisdictional prerequisites:

a. Custody: The petitioner must be in custody. 28 U.S.C. § 2241; Maleng v. Cook, 490 U.S. 488 (1989); Wales v. Whitney, 114 U.S. 564 (1885).

(1) Types of custody.
(a) Confinement. E.g., Ex Parte Reed, 100 U.S. 13 (1879).

(b) Involuntary military service. E.g., Parisi v. Davidson, 405 U.S. 34 (1972); Wiggins v. Secretary of the Army, 946 F.2d 892 (5th Cir. 1991).

(2) Jurisdiction is not lost if the petitioner is subsequently released. Carafas v. La Vallee, 391 U.S. 234 (1968); cf. Hensley v. Municipal Court, 411 U.S. 345 (1973) (bail); Jones v. Cunningham, 371 U.S. 236 (1963) (parole).

b. Venue: Petitioner's presence within the territorial jurisdiction of the district court jurisdiction is not an invariable prerequisite. Rather, because the writ of habeas corpus does not act upon the person who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody, a district court acts within its respective jurisdiction as long as the custodian can be reached by service of process. Rasul v. Bush, 542 U.S. 466 (2004). See also Rumsfeld v. Padilla, 542 U.S. 426 (2004); Rooney v. Secretary of the Army, 405 F.3d 1029 (D.C. Cir. 2005).

G. Civil Rights Statutes. 28 U.S.C. § 1343.

"(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of a conspiracy mentioned in section 1985 of Title 42;

(2) To redress the deprivation, under color of State law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

(3) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

-- 28 U.S.C. § 1343.

H. Other statutes granting jurisdiction.

I. Provisions often erroneously cited as jurisdictional grounds for federal lawsuits.

1. Administrative Procedure Act, 5 U.S.C. §§ 701-06. Califano v. Sanders, 430 U.S. 99 (1977).

2. Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1952).

III. JUSTICIABILITY.

A. Introduction.

1. Constitutional limits on federal jurisdiction.

a. Cases that raise certain subjects or involve certain parties. U.S. Const. art. III, § 2.

b. "Cases" and "Controversies." Id.

2. Justiciability is the term of art employed to give expression to the dual limitation imposed upon the federal courts by the "case and controversy" doctrine. Flast v. Cohen, 392 U.S. 83 (1968).

a. Involves application of both constitutional limitations and prudential concerns.

b. Two-pronged doctrine:

(1) Adversarial prong.

(2) Political question prong.

3. Justiciability and the role of the federal courts. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363 (1973).

B. The Adversarial Prong

1. General.

2. Advisory opinions.

a. Definition. An advisory opinion is an answer to a hypothetical question of law unconnected to any particular case.

b. Examples: Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792); Correspondence of the Justices and Secretary of State Thomas Jefferson (1793).

3. Ripeness.

a. Definition: "[T]he conclusion that an issue is not ripe for adjudication ordinarily emphasizes a prospective examination of the controversy which indicates that future events may affect its structure in ways that determine its present justiciability, either by making a later decision more apt or by demonstrating directly that the matter is not yet appropriate for adjudication by an article III court." L. Tribe, American Constitutional Law 61 (2d Ed. 1988) (emphasis in the original).

b. Rationale: Avoid premature adjudication of suits and protect agencies from unnecessary judicial interference. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), overruled on other grounds, Califano v. Sanders, 430 U.S. 99 (1977). And avoid "abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. Id., at 148-49. See also Nat'l Park Hospitality Ass'n. v. Dept. of Interior, 538 U.S. 803 (2003).

c. Rule: In determining whether a case is ripe for adjudication, a court must--

(1) Evaluate the fitness of the issues for judicial decision; and

(a) Is the agency action final?

(b) Are the issues legal or factual?

(c) Have administrative remedies been exhausted?

(d) What is the nature of the record created?

(2) Determine the hardship to the parties of withholding court decision.

(a) What is the likelihood the challenged action will affect the plaintiff?

(b) What is the nature of the consequences risked by the plaintiff if affected by the action?

(c) Will the plaintiff be forced to alter conduct as a result of the action?

d. Examples:

(1) Pre-enforcement attacks on statutes or regulations. Compare Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967), with Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) overruled other grounds Califano v. Sanders, 430 U.S. 99 (1977). See also Nat'l Park Hospitality Ass'n. v. Dept. of Interior, 538 U.S. 803 (2003).

(2) Challenges to pending administrative or judicial proceedings. Hastings v. Judicial Conference, 770 F.2d 1093 (D.C. Cir. 1985); Watkins v. United States Army, No. C-81-1065R (W.D. Wash. Oct. 23, 1981).

(3) Threat to commit military forces without congressional authorization. Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990); Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990).

4. Mootness.

a. Definition: "[M]ootness looks primarily to the relationship between past events and the present challenge in order to determine whether there remains a 'case or controversy' that meets the article III test of justiciability." L. Tribe, American Constitutional Law 62 (1988).

b. General rule: There is no case or controversy once the issues in a lawsuit have been resolved.

c. Test: A case becomes moot when--

(1) "[I]t can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur," and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. 625, 635 (1979); See also McFarlin v. Newport Special School District, 980 F.2d 1208 (8th Cir. 1992).

d. Examples:

(1) Save the Bay, Inc. v. United States Army, 639 F.2d 1100 (5th Cir. 1981).

(2) Quinn v. Brown, 561 F.2d 795 (9th Cir. 1977).

(3) Ringgold v. United States, 553 F.2d 309 (2d Cir. 1977).

(4) Conyers v. Reagan, 765 F.2d 1124 (D.C. Cir. 1985).

(5) Oakville Development Corp. v. FDIC, 986 F.2d 611 (1st Cir. 1993).

(6) Ethredge v. Hail, 996 F.2d 1173 (11th Cir. 1993).

e. Exceptions:

(1) Capable of repetition, yet evading review. Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

(a) Test (Weinstein v. Bradford, 423 U.S. 147, 149 (1975)):

i) The challenged action is too short in its duration to be fully litigated prior to its cessation or expiration; and

ii) There is a reasonable expectation the same complaining party will be subject to the same action again.

(b) Examples: Compare Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Sullivan, 938 F.2d 1370 (D.C. Cir. 1991) (No. 91-5019), with Flynt v. Weinberger, 588 F. Supp. 57 (D.D.C. 1984), aff'd, 762 F.2d 134 (D.C. Cir. 1985) and Nation Magazine v. Department of Defense, 762 F. Supp. 1558 (S.D.N.Y. 1991).

(2) Voluntary cessation.

(a) Rule: A case is not made moot merely because a defendant voluntarily ceases his allegedly unlawful conduct. United States v. W.T. Grant Co., 345 U.S. 629 (1953).

(b) Example: Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976).

(3) Collateral consequences.

(a) Rule: A case is not moot where, even though stopped, the government's allegedly unlawful conduct leaves lasting adverse consequences. Sibron v. New York, 392 U.S. 40 (1968).

(b) Example: Connell v. Shoemaker, 555 F.2d 483 (5th Cir. 1977).

(4) Class actions.

(a) Mootness of the class representative's claim after the class has been certified: the case is not moot. Sosna v. Iowa, 419 U.S. 393 (1975); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976).

(b) Mootness of the class representative's claim after motion for class certification has been made and denied, but before appeal from the denial: the case is not moot. United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).

i) The Supreme Court has proscribed the interlocutory appeal of denials of class certification. Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978); Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

ii) The Supreme Court has allowed class members to intervene to appeal the denial of class certification after the named plaintiff's claim has been fully satisfied. United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977).

(c) Mootness of the class representative's claim before class certification: the case may be moot. Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128 (1975).

(d) Mootness of the claims of the members of the class: the case may be moot or the class may be realigned. Kremens v. Bartley, 431 U.S. 119 (1977).

5. Standing.

a. General.

(1) Focuses primarily on the party seeking to get his complaint before the federal court, and only secondarily on the issues raised.

(2) Subsumes both constitutional and prudential considerations.

b. Constitutional Requirements.

(1) General rule: To establish standing, a plaintiff must demonstrate--

(a) That he has personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. [Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable?] Meese v. Keene, 481 U.S. 465 (1987); George v. State of Texas, 788 F.2d 1099 (5th Cir.), cert. denied, 479 U.S. 866 (1986).

i) An asserted right to have the government act in accordance with law does not confer standing. Allen v. Wright, 468 U.S. 737 (1984); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1978).

ii) Mere interest of plaintiff in an issue does not confer standing. Diamond v. Charles, 476 U.S. 54 (1986); Sierra Club v. Morton, 405 U.S. 727 (1972); International Primate Protection League v. Institute for Behavioral Research, Inc., 799 F.2d 934 (4th Cir. 1986).

(b) That the injury is traceable to the acts or omissions of the defendant (causation requirement). [Is the line of causation between the illegal conduct and injury too attenuated?] Warth v. Seldin, 422 U.S. 490 (1975); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976).

(c) That the plaintiff's stake in the controversy is sufficient to ensure that the injuries claimed will be effectively redressed by a favorable court decision. [Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?] Linda R.S. v. Richard D., 410 U.S. 614 (1973).

(2) Illustrative cases: Compare Laird v. Tatum, 408 U.S. 1 (1972), with Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976).

c. Taxpayer Standing.

(1) Test: To establish standing as a taxpayer, a plaintiff must demonstrate--

(a) A nexus between his taxpayer status and the type of legislation being challenged. Taxpayer standing is only proper where the plaintiff challenges exercises of congressional power under the taxing and spending clause of the Constitution. U.S. Const. art. I, § 8.

(b) A nexus between the taxpayer status and the precise nature of the constitutional infringement alleged. The plaintiff must show a specific constitutional limitation on the taxing and spending power of Congress. Flast v. Cohen, 392 U.S. 83, 102-103 (1968); Frothingham v. Mellon, 262 U.S. 447 (1923).

(2) Illustrative case: Katcoff v. Marsh, 582 F. Supp. 468 (E.D.N.Y. 1984), aff'd, in part 755 F.2d 223 (2d Cir. 1985).

(3) Variations in approach:

(a) Challenge to congressional exercise under the property clause, U.S. Const. art. I, § 3, cl. 2. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982).

(b) Challenge under the incompatibility clause, U.S. Const. art. I, § 9, cl. 7. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

(c) Challenge under the accounting clause, U.S. Const. art. I, § 9, cl. 7. United States v. Richardson, 418 U.S. 166 (1974)

(d) Challenge under foreign affairs powers, U.S. Const. art. I, § 10, cl. 1. Americans United for Separation of Church & State v. Reagan, 786 F.2d 194 (3d Cir. 1986).

(e) Challenge under war powers and Commander-in-Chief clauses, U.S. Const. art. I, § 8, cl. 11 and art. II, § 2. Pietsch v. Bush, 755 F.Supp. 62 (E.D.N.Y.), aff'd, 935 F.2d 1278 (2d Cir. 1991).

d. Citizen Standing. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); Pietsch v. Bush, 755 F. Supp. 62 (E.D.N.Y.), aff'd, 935 F.2d 1278 (2d Cir. 1991).

e. Prudential Standing Considerations.

(1) Jus tertii.

(a) General rule: A plaintiff may not claim standing to vindicate the constitutional rights of third parties. Tileston v. Ullman, 318 U.S. 44 (1943); Tyler v. Judges of Ct. of Registration, 179 U.S. 405 (1900); Monaghan, Third Party Standing, 84 Colum. L. Rev. 277 (1984).

i) Corollary: A plaintiff may only challenge a statute or regulation in the terms in which it is applied to him. Parker v. Levy, 417 U.S. 733 (1974).

ii) Rationale: (A) courts should not make unnecessary constitutional adjudications, and (B) the holders of constitutional rights are the best parties to assert the rights. Singleton v. Wulff, 428 U.S. 106 (1976).

(b) Exceptions:

i) Countervailing policies. See, e.g., Carey v. Population Serv. Int'l, 431 U.S. 678 (1977); Singleton v. Wulff, 428 U.S. 106 (1976).

ii) Statute confers third-party standing. See, e.g., Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979).

(2) "Generalized grievances" shared in substantially equal measure by all or a large class of citizens. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); Pietsch v. Bush, 755 F. Supp. 62 (E.D.N.Y.), aff'd, 935 F.2d 1278 (2d Cir. 1991).

(3) Interest within the "zone of interests" arguably protected or regulated by the law in question. Lujan v. National Wildlife Foundation, 504 U.S. 555 (1992); Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970); National Federation of Fed. Employees v. Cheney, 883 F.2d 1038 (D.C. Cir.), reh'g denied, 892 F.2d 98 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 3214 (1990); Hadley v. Secretary of the Army, 479 F. Supp. 189 (D.D.C. 1979).

f. Associational Standing.

(1) Suits for injuries suffered by the association. Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); NAACP v. Alabama, 357 U.S. 449 (1958).

(2) Suits for injuries suffered by members. International Union, UAW v. Brock, 477 U.S. 274 (1986); Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 342-43 (1976). See also Randolph-Sheppard Vendors v. Weinberger, 795 F.2d 90 (D.C. Cir. 1986). For an association to have standing to sue on behalf of its members, it must show following:

(a) The conduct challenged is injurious to its members;

(b) The claim is germane to the association's purposes;

(c) The cause can proceed without the participation of the individual members affected by the challenged conduct.

C. The Political Question Prong.

1. Description of the Doctrine.

a. "Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable or manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Baker v. Carr, 369 U.S. 186, 217 (1962).

b. "[T]he doctrine incorporates three inquiries: (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate political branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" Goldwater v. Carter, 444 U.S. 996, 998 (1980) (Powell, J., concurring).

2. Illustrative cases:

a. Organization, training, and weaponry of the armed forces. Gilligan v. Morgan, 413 U.S. 1 (1973).

b. Commitment and use of military forces. Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990); Nejad v. United States, 724 F. Supp. 753 (C.D. Cal. 1989); In re Korean Air Lines Disaster of Sept. 1, 1983, 597 F. Supp. 613 (D.D.C. 1984); Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332 (S.D.N.Y. 1984), aff'd, 755 F.2d 34 (2d Cir. 1985); Conyers v. Reagan, 578 F. Supp. 324 (D.D.C. 1984), appeal dismissed, 765 F.2d 1124 (D.C. Cir. 1985); Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), aff'd, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984); Rappenecker v. United States, 509 F. Supp. 1024 (N.D. Cal. 1980); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973). But see Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990).

c. Establishment of diplomatic relations. Phelps v. Reagan, 812 F.2d 1293 (10th Cir. 1987); Americans United for Separation of Church & State v. Reagan, 786 F.2d 194 (3d Cir.), cert. denied, 479 U.S. 1012 (1986).

d. Repatriation of POW's. Smith v. Reagan, 637 F. Supp. 964 (E.D.N.C. 1986); Dumas v. President of the United States, 554 F. Supp. 10 (D. Conn. 1982).

e. Relief from or placement in command. Wood v. United States, 968 F.2d 738 (8th Cir. 1992).

f. Setting standards at service academies. Green v. Lehman, 544 F. Supp. 260 (D. Md. 1982), aff'd, 744 F.2d 1049 (4th Cir. 1984).

g. Establishing promotion quotas. Blevins v. Orr, 553 F. Supp. 750 (D.D.C. 1982), aff'd, 721 F.2d 1419 (D.C. Cir. 1983).

h. Conduct of military intelligence activities. Laird v. Tatum, 408 U.S. 1 (1972); United Presbyterian Church v. Reagan, 738 F.2d 1375 (D.C. Cir. 1984).

i. Making political appointments. National Treasury Employees Union v. Bush, 715 F. Supp. 405 (D.D.C. 1989).

j. Enforcement of accession standards. Whittle v. United States, 7 F.3d 1259 (6th Cir. 1993).

k. President's designation of pharmaceutical plant in Sudan as enemy property. El-Shifa Pharmaceutical Industries Co. v. United States, 378 F.3d 1346 (Fed. Cir. 2004).

l. Implementation of BRAC recommendations. Gregoire v. Rumsfeld, 463 F.Supp.2d 1209 (W.D. Wash. 2006).

FEDERAL LITIGATION COURSE

TAB C

PLEADINGS AND MOTION PRACTICE

I. INTRODUCTION.

A. Background.

B. Purpose of the Federal Rules of Civil Procedure.

II. PAPER MANAGEMENT IN THE FEDERAL COURTS.

A. Pleadings, Motions, and Other Papers.

1. Pleadings. Fed. R. Civ. P. 7(a).

a. "Pleadings" are limited to the complaint, answer, answer to a counterclaim designated as a counterclaim, answer to a crossclaim, third-party complaint, and answer to a third-party complaint.

b. No other "pleadings" are allowed, except the court can order a reply to an answer..

c. All of the above can be considered under the general heading of complaint, answer, and reply.

d. Definition becomes important when taken in context of other rules. E.g., Fed. R. Civ. P. 12(c) which provides for judgment on the pleadings; Fed. R. Civ. P. 15(a), which allows a party to amend once as of course any time within 21 days of serving the pleading or (if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

2. Motions and Other Papers. Fed. R. Civ. P. 7(b).

a. A motion is an application to the court for an order.

b. Must be in writing (unless made during a hearing or trial), must state with particularity the grounds, and must set forth the relief or order sought.

c. Fed. R. Civ. P. 7(b)(2) provides that the rules as to caption and other matters of form apply to motions and other papers.

d. Local court rules may substantially impact motion practice by limiting number of pages, setting time requirements for notice, response, etc.

B. Signing Pleadings, Motions, and Other Papers. Fed. R. Civ. P. 11.

1. Background.

a. Prior to 1 August 1983, the signature of an attorney on a pleading or motion certified that to the best of the signer's belief "there is good ground to support it."

b. Whether a particular document was signed in violation of Rule 11 required the court to conduct a subjective inquiry into the lawyer's knowledge and motivation for signing. "Good faith" was a defense, and sanctions were imposed only upon a determination that the lawyer acted willfully or in bad faith.

c. Sanctions were seldom imposed, and frivolous pleadings that caused delay and increased the cost of litigation were becoming more numerous. In 1983, Rule 11 was amended to address these problems.

d. The 1993 amendments to the rule were intended to remedy problems that arose in interpretation of the rule but retained the principle that attorneys and *pro se* litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1 to "secure the just, speedy, and inexpensive determination of every action."

2. Requirements of Rule 11.

a. Every pleading, motion, or other paper shall be signed by an attorney of record. If the party is not represented by an attorney, the party must sign. The paper must state the signer's address, e-mail address, and phone number; there need not be an affidavit attached.

b. Signature certifies that:

(1) the person signing has read the document [While not expressly stated in the rule, the obligations imposed by the rule obviously require that a signer first read the document.];

(2) to the best of the person's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact (has or is likely to have evidentiary support) and is warranted by existing law or a good faith (non-frivolous) argument for the extension, modification, or reversal of existing law or the establishment of new law; and

(3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

c. Current rule imposes an objective standard by which to measure the actions of the litigants. "Simply put, subjective good faith no longer provides the safe harbor it once did." Eastway Construction Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985) (Decided before Rule 11 was revised in 1993 to include crucial language that "the court may impose an appropriate sanction." Fed.R.Civ.P. 11(c)(1); see Ipcon Collections LLC v. Costco Wholesale Corp., 698 F.3d 58 (N.Y. 2012). Accord Ridder v. City of Springfield, 109 F.3d 288 (6th Cir. 1997) (but see Hamil v. Mobex Managed Services Co., 208 F.R.D. 247 (N.D.Ind. 2002)); F.D.I.C. v. Calhoun, 34 F.3d 1291 (5th Cir. 1994); Pacific Dunlop Holdings, Inc. v. Barosh, 22 F.3d 113 (7th Cir. 1994); Blackhills Institute of Geological Research v. South Dakota School of Mines and Technology, 12 F.3d 737 (8th Cir. 1993); Paganucci v. New York, 993 F.2d 310 (2d Cir. 1993) (The standard is whether a reasonably competent attorney would have acted similarly.).

d. Whether the required inquiry into the law and the facts of the case is "reasonable" will depend upon the facts and circumstances of the particular case. The following factors have been considered by the courts to determine the appropriateness of the pre-signature inquiry:

(1) As to the facts:

(a) the time available for investigation;

(b) the extent of the attorney's reliance upon the client for the factual basis of the document;

(c) the feasibility of a pre-filing investigation;

(d) whether the attorney accepted the case on referral from another attorney;

(e) the complexity of the issues; and

(f) the extent to which development of the facts underlying the claim requires discovery.

Childs v. State Farm Mutual Automobile Insurance Co., 29 F.3d 1018, 1026 (5th Cir. 1994). Practice Point: Relying on labor counselor filings to respond to Complaint could be violation of duty under Rule 11: *In re Connetics Corp. Secs. Litig.*, 2008 U.S. Dist. LEXIS 9634 (N.D. Cal. Jan. 28, 2008) (Rule 11 violation if attorney relies on previously filed complaint without conducting his own inquiry into propriety of allegations/defenses; duty to inquire is non-delegable).

(2) As to the law:

(a) the time available to prepare the document before filing;

(b) the plausibility of the legal view contained in the document;

(c) whether the litigant is pro se; and

(d) the complexity of the legal issues involved.

Thomas v. Capital Sec. Services, Inc., 836 F.2d 866, 875-76 (5th Cir. 1988) (en banc). See, e.g., Rode v. United States, 812 F.Supp. 45 (M.D. Pa. 1992) (Rule 11 sanctions not imposed against plaintiff's counsel in FTCA suit against U.S. where plaintiff's counsel cited court opinions, albeit from districts outside circuit, in support of more liberal approach to construing jurisdictional prerequisites to FTCA action). Cf. Knipe v. United States, 151 F.R.D. 24 (N.D.N.Y. 1993) (FTCA action against FAA raised frivolous arguments and was brought

for improper purpose, warranting imposition of Rule 11 sanctions on plaintiff's attorney).

e. The courts *were* split on whether compliance is measured at the time the document is signed and filed or if there is a continuing duty to amend when additional information reveals that the claim is frivolous or that the allegations are unsupported. Compare Thomas v. Capital Sec. Services, Inc., 836 F.2d 866 (5th Cir. 1988) (no continuing duty); with Kale v. Combined Ins. Co. of America, 861 F.2d 746 (1st Cir. 1988) (continuing duty) and Skidmore Energy, Inc. v. KPMG, 455 F.3d 564 (5th Cir. 2006) (declining to extend the no duty rule proposed in Thomas). The 1993 amendments to the rule make clear that although a formal amendment to pleadings may not be required, Rule 11 is violated by continuing to assert ("later advocating") claim or defense after learning that it has no merit.

3. Sanctions for Violations of Rule 11.

a. "If, after notice and a reasonable opportunity to respond, the court determines that [Rule 11] has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." Fed. R. Civ. P. 11(c).

b. Sanctions can be imposed upon the attorneys, the law firms, or the parties that have violated the rule or who are responsible for the violation. (Usually the person signing, filing, submitting or advocating a document.) **"**Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees." Fed. R. Civ. P. 11(c)(1). Sanctions may be imposed upon pro se litigants who violate Rule 11, although the court should consider plaintiff's pro se status in determining whether the filing in question was reasonable. Patterson v. Aiken, 841 F.2d 386 (11th Cir. 1988); Brown v. Consolidated Freightway, 152 F.R.D. 656 (N.D. Ga. 1993). Cf. Clark v. Green, 814 F.2d 221 (5th Cir. 1987) (imposing sanctions under Rule 38 of Fed. R. App. P. against pro se litigant for totally frivolous appeal).

c. Sanctions may include: striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other education programs; ordering a fine payable to the court; referring the matter to

disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc. Also, the Court may award reasonable expenses and attorney's fees to the prevailing party. See Blue v. U.S. Dept. of Army, 914 F.2d 525 (4th Cir. 1990) (government awarded costs and attorneys' fees for plaintiff's bad-faith pursuit of employment discrimination action), cert. denied 499 U.S. 959 (1991).

d. Compensatory awards should be limited to unusual circumstances. Non-monetary sanctions are proper and suggested. Sanctions are "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(2). See Sato v. Plunkett, 154 F.R.D. 189 (N.D. Ill. 1994).

e. Safe harbor provision: Motion for sanctions shall be made and served separately and may be filed with the court only if the challenged paper, claim, or defense is not withdrawn or corrected within 21 days after service. Fed. R. Civ. P. 11(c)(2).

f. Ordinarily, a motion for sanctions should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. See Retail Flooring Dealers of America, Inc. v. Beaulieu of America, LLC, 339 F.3d 1146 (9th Cir. 2003) (sanctions award precluded because motion was served after complaint had been dismissed and the period within which an amended complaint could be filed had expired).

g. Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by the rule.

4. Rule 11 does not apply to discovery. Fed. R. Civ. P. 11(d). However, Rules 26(g) and 37 establish similar certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions.

C. Commencing the Action.

1. "A civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3.

2. "Filing" is accomplished by complying with local rules as to delivery of the requisite number of copies of the complaint to the clerk of court's office and having the complaint logged into the court's docket file. A pleading, motion, or other paper is not "filed" until received by the clerk; depositing a document in the mail is not "filing." Cooper v. Ashland, 871 F.2d 104 (9th Cir. 1989); Torras Herreria v. M/V Timur Star, 803 F.2d 215 (6th Cir. 1986). Note: Rule 5(d)(3) is codification of current local rules from various courts allowing electronic filing procedures.

3. Under federal question jurisdiction, the statute of limitations is tolled by the filing of the complaint with the court. West v. Conrail, 481 U.S. 35 (1987) (but see Prazak v. Local 1 Intern. Union of Bricklayers & Allied Crafts, 233 F.3d 1149 (9th Cir. 2000), in which the case originated in state court and subsequently removed to federal court); Sentry Corp. v. Harris, 802 F.2d 229 (7th Cir. 1986), cert. denied, 481 U.S. 1004 (1987). If jurisdiction is based upon diversity of citizenship and the state statute specifies that the period of limitations is tolled only upon service of process, the state rule will apply. Walker v. Armco Steel Corp., 446 U.S. 740 (1980).

D. Service of Process.

1. "On or after the filing of the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant." Fed. R. Civ. P. 4(b).

2. The summons is signed by the clerk, under the seal of the court. It should set out the name of the parties, the name of the court, and the name and address of the plaintiff or his attorney, if represented. It also should state the time within which the defendant must appear and defend, and warns that failure to respond in a timely fashion will result in default. See Fed. R. Civ. P. 4(a). Practice Point: Clerks of Court routinely err in applying the 21-day response time as opposed to the 60-day response time for United States and federal agencies as stated in Fed. R. Civ. P. 12(a)(1)&(2). Also, a summons must be issued for each defendant to be served. Fed. R. Civ. P. 12(b).

3. If the plaintiff fails to serve the summons and complaint within 120 days of commencing the action, the court "must" (upon motion or on its own initiative) dismiss the action without prejudice or direct that service be effected within a specified time unless plaintiff can show good cause why service was not made within the period specified. Fed. R. Civ. P. 4(m). Momah v. Albert Einstein Medical Center, 158 F.R.D. 66 (E.D. Pa. 1994); See also Lovelace v. Acme Markets, Inc., 820 F.2d 81 (3d Cir.), cert. denied, 484 U.S. 965 (1987) (but see Crutchley v. Sun Dog Marina, Inc., 2011 WL 6071807 (D.N.J. Dec 05, 2011), which did not follow Lovelace on state law grounds); Townsel v. Contra Costa County, Cal., 820 F.2d 319 (9th Cir. 1987). Ignorance of Rule 4(m) by pro se litigants does not excuse their failure to serve within 120 days. Lowe v. Hart, 157 F.R.D. 550 (M.D. Fla. 1994).

4. Serving the United States.

   a. Pursuant to Rule 4(i)(1), service on the United States shall be effected:

      (1) By delivering a copy of the summons and complaint to the United States attorney for the district in which the action is brought; or to an assistant United States attorney or designated clerical employee who has been designated by the United States attorney in writing to the court to receive service of process, or by sending a copy of the summons and complaint by registered or certified mail addressed to the civil process clerk at the office of the United States Attorney; and,

      (2) By also sending a copy of the summons and complaint by registered or certified mail to the Attorney General in Washington; and,

      (3) If attacking the validity of an order of an officer or agency of the United States not made a party, by sending a copy of the summons and complaint by registered or certified mail to such officer or agency.

b. Practice Point - Is Fed Ex registered or certified mail? Coulter v. DHS, 2008 U.S. Dist. LEXIS 73014 (D.N.J. 2008) (No). But see Tracphone Wireless, Inc. v. Washington, 2013 WL 3974709 (court granted plaintiff's unopposed motion for alternative service of process).

c. Practice Point - Is service proper if hand deliver to any AUSA? Constien v. U.S. , 2010 WL 2618536 (W.D. Okla. 2010) (No).

d. Note that the waiver of service provisions of Rule 4(d), discussed below, are not applicable to the United States as a defendant.

5. Pursuant to Rule 4(i)(2), service on an officer (in his or her official capacity only) or an agency of the United States shall be effected:

a. By serving the United States (meaning service on the U.S. Attorney and the Attorney General as discussed above); and,

b. By sending a copy of the summons and complaint by registered or certified mail to the named officer or agency. Service beyond the territorial limits of the forum state may be authorized by 28 U.S.C. § 1391(e).

c. Note that the waiver of service provisions of Rule 4(d), discussed below, are not applicable to United States officers of agencies sued in their official capacity.

d. The court shall allow a plaintiff who fails to effect service properly on a United States agency or officer served in his/her official capacity a "reasonable time" to cure defects in service, provided plaintiff has effected service on either the U.S. Attorney or the Attorney General. Fed. R. Civ. P. 4(i)(4).

6. Pursuant to Rule 4(i)(3), service on an officer or an employee of the United States (in his or her individual capacity – whether or not the officer or employee is sued also in an official capacity) for "acts or omissions occurring in connection with the performance of duties on behalf of the United States" shall be effected:

a. By serving the United States (meaning service on the U.S. Attorney and the Attorney General as discussed above); and,

b. By serving the officer or employee in the manner prescribed by Rule 4 (d), (e), (f), or (g).

c. Note that the waiver of service provisions of Rule 4(d), discussed below, **do** apply.

d. Includes former employees.

e. The court shall allow a plaintiff who fails to effect service properly on the United States "reasonable time" to cure defects in service required by Rule 4(i)(2-3), provided plaintiff has effected service on the officer or employee of the United States sued in an individual capacity. Fed. R. Civ. P. 4(i)(4).

7. Service on an Individual Defendant – Rule 4(e).

a. Service upon individuals within a judicial district of the United States is effected:

(1) By delivering a copy of the summons and complaint to him/her personally or by leaving copies at his/her house or usual place of abode with some person of suitable age and discretion who also resides at the house or by delivering copies to an agent authorized by appointment or by law to receive service of process (Fed. R. Civ. P. 4(e)(2)); or,

(2) By serving the defendant in accordance with the law of the state wherein the district court sits. Fed. R. Civ. P. 4(e)(1); or,

(3) By obtaining the defendant's waiver of service as specified in Rule 4(d).

b. Service upon individuals in a foreign country is effected:

(1) By any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (entered into force for the United States on February 10, 1969); or

(2) If there is no internationally agreed means of service or the applicable international agreement allows other means of service (provided that such method of service is reasonably calculated to give notice):

(a) in the manner prescribed by the law of the foreign country for service in that country;

(b) as directed by a foreign authority in response to a letter rogatory or letter of request; or

(c) unless prohibited by law of the foreign country, by delivery to the individual personally, or by any form of mail requiring a signed receipt, addressed and dispatched by the clerk of the court to the party to be served (Fed. R. Civ. P. 4(f)(2)); or

(3) By other means not prohibited by international agreement as may be directed by the court. Fed. R. Civ. P. 4(f)(3).

(4) Service may also be effected by obtaining the defendant's waiver of service, as specified in Rule 4(d).

c. Waiver of Service. Fed. R. Civ. P. 4(d).

(1) Plaintiff sends notice, request for waiver, and copy of the complaint by reliable means, along with an extra copy and a prepaid means of compliance. Must allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent (60 days if the defendant is outside the United States).

(2) Defendant bears costs for effecting formal service unless "good cause" shown for failure to consent to waiver.

(3) A defendant that waives formal service is entitled to 60 days after request for waiver sent to answer the complaint (90 days if the defendant is outside the United States).

8. Service of process on the installation. (AR 27-40, Chapter 2)

a. Commanders and officials will not evade service of process in actions brought against the U.S. or themselves concerning official duties. Reasonable restriction on the service of process on the installation may be imposed.

b. If acceptance of service would interfere with duty--appoint agent or representative to accept service.

III. COMPLAINT AND ANSWER.

A. Complaint.

1. Format.

a. "Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation." Fed. R. Civ. P. 10(a).

b. The caption of the complaint must contain the names of all parties; subsequent pleadings need only contain the name of the first party on each side with appropriate indication of other parties (such as "et al."). Fed. R. Civ. P. 10(a).

c. Averments must be set forth in separate numbered paragraphs. Claims founded upon separate transactions or occurrences should be set forth in separate counts. Fed. R. Civ. P. 10(b).

2. Contents. Fed. R. Civ. P. 8(a).

a. A short and plain statement of the grounds for the court's jurisdiction.

b. A short and plain statement of the claim showing that the pleader is entitled to the relief sought.

c. A demand for judgment for the relief the plaintiff deems himself entitled. Alternative and various types of relief may be demanded in the same complaint.

d. Courts may liberally construe the pleadings of *pro se* litigants.

B. Answer.

1. Format. Fed. R. Civ. P. 10.

2. Contents. Fed. R. Civ. P. 8(b)&(c).

   a. "A party must state in short and plain terms its defenses to each claim asserted. . . ." Fed. R. Civ. P. 8(b).

      (1) Rule 8(c) sets forth those defenses that must be pled affirmatively. NOTE: December 2010 Amendments to the Fed. R. Civ. P. eliminate the requirement to plead "discharge in bankruptcy" as an affirmative defense.

      (2) Under Rule 10(b) each affirmative defense should be set forth in a separate numbered paragraph.

      (3) If you fail to plead an affirmative defense, it *may* be waived. Compare Simon v. United States, 891 F.2d 1154, 1159 (5th Cir. 1990)(failure of United States to affirmatively plead as a defense to an FTCA action the Louisiana Medical Malpractice Act limitation on damages resulted in waiver of that defense) with Owen v. U.S., 935 F.2d 734 (5th Cir. 1991)(fact that U.S. pled the cap and specifically noted it in pre-trial order distinguishes Simon).

      (4) But the "technical" failure to plead an affirmative defense may not be fatal. See Blaney v. United States, 34 F.3d 509, 512 (7th Cir. 1994)(Air Force's failure to plead statute of limitations as an affirmative defense in answer did not constitute a waiver of the matter where the Air Force raised the issue in a motion to dismiss and the district court chose to recognize the defense). Cf. Harris v. Secretary, Dep't of Veterans Affairs, 126 F.3d 339, 345 (D.C. Cir. 1997) (holding that a party must first raise its affirmative defenses in a responsive pleading before it can raise them in a dispositive motion). See Rule 12(h).

(5) The defendant may seek leave to amend, pursuant to Rule 15(a), to add an affirmative defense. Such leave should be freely granted when the interests of justice so require. See Phyfer v. San Gabriel Development Corp., 884 F.2d 235, 241 (5th Cir. 1989)(district court properly granted leave to amend answer to add affirmative defense of collateral estoppel where there was no unfair surprise to the plaintiff). See also Sanders v. Dep't of the Army, 981 F.2d 990, 991 (8th Cir. 1992)(district court did not abuse its discretion in allowing government to raise statute of limitations in motion to dismiss filed two months after its answer, when, *inter alia*, the court properly granted government leave to amend its answer to expressly include the omitted limitations defense).

b. "A party…must admit or deny the allegations asserted against it by an opposing party." Fed. R. Civ. P. 8(b)(1)(B).

(1) Must admit or deny each allegation of the complaint. May deny specific allegations of specific paragraphs and admit the remainder, or may make general denial with specific admissions. For example:

- "Paragraph # is admitted."
- "Admitted that_____. Denied that_____.
- "The first sentence of paragraph # is admitted. The remainder of paragraph # is denied."
- # . Admitted.
- "Plaintiff admits that_____and denies that _____."

(2) Failure to deny constitutes an admission.

(3) If pleader is without knowledge or information sufficient to form a belief as to the truth of an allegation, he can so state in his answer and it will have the effect of a denial.

(4) Can enter a general denial to all the allegations of the complaint, BUT, consider Rule 11.

3. Time to Answer.

a. Government and official capacity defendants have 60 days to answer; private defendant has 21 days. Fed. R. Civ. P. 12(a)(2). Government employee sued for acts or omissions occurring in connection with the performance of duties on behalf of the United States have 60 days to answer, counting from later of: service on officer or employee, or service on the United States attorney. Fed. R. Civ. P. 12(a)(3). If service of summons is waived under Rule 4(d), then 60 days after request for waiver. Id.

b. A motion served under Rule 12 enlarges the time to answer until 14 days after notice of the court's action on the motion (unless a different time is fixed by court order). Fed. R. Civ. P. 12(a)(4) or 14 days after a more definite statement is filed if a motion for more definite statement is filed pursuant to Rule 12(e).

IV. MOTION PRACTICE.

A. General.

B. Motion to Dismiss. Fed. R. Civ. P. 12(b).

1. Federal courts simply require notice pleading and must construe pleadings liberally in ruling on motions to dismiss. Clorox v. Chromium Corp., 158 F.R.D. 120 (N.D. Ill. 1994) (citing, inter alia, Leatherman v. Tarrant County Narcotics Unit, 507 U.S. 163 (1993)).

2. Lack of jurisdiction over the subject matter. Fed. R. Civ. P. 12(b)(1).

a. Except for Supreme Court's original jurisdiction, federal judicial power is dependent upon a statutory grant of jurisdiction. Kline v. Burke Constr. Co., 260 U.S. 226, 233-34 (1992); Stevenson v. Fain, 195 U.S. 165, 167 (1904).

b. The burden of pleading and proving the subject-matter jurisdiction of the court is on the plaintiff. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182, 189 (1936). Normally, the defendant is bound by the amount

claimed by the plaintiff unless "it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed." St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938). Federal court jurisdiction cannot be presumed, but must be affirmatively and positively pled. Norton v. Larney, 266 U.S. 511 (1925).

c. Lack of jurisdiction over the subject matter cannot be waived and can be raised for the first time on appeal. In fact, any court considering a case has a duty to raise the issue sua sponte if it appears that subject matter jurisdiction is lacking. Emrich v. Touche Ross & Co., 846 F.2d 1190 (9th Cir. 1988) (but see Pauly v. Eagle Point Software Co., Inc., 958 F.Supp. 437 (N.D.Iowa 1997) (declined to follow Emrich)).

d. A "facial attack" on the court's jurisdiction goes to whether the plaintiff has properly alleged a basis of subject matter jurisdiction. A "factual attack" challenges the existence of subject matter jurisdiction in fact, regardless of the allegations in the complaint. Matter outside the complaint may be considered by the court in resolving the issue. See, e.g., Stanley v. C.I.A., 639 F.2d 1146 (5th Cir. 1981) (granting leave to amend when it appeared that plaintiff may have pleaded a colorable section 1983 claim in his complaint, rather than the FTCA cause of action asserted); Menchaca v. Chrysler Credit Corp., 613 F.2d 507 (5th Cir.), cert. denied, 449 U.S. 953 (1980).

e. Considering matters outside the pleadings does not convert a motion to dismiss for lack of subject matter jurisdiction into a motion for summary judgment and the dismissal is not an adjudication on the merits. Haase v. Sessions, 835 F.2d 902 (D.C. Cir. 1987); Stanley v. C.I.A., 639 F.2d 1146 (5th Cir. 1981). But cf. Sutton v. United States, 819 F.2d 1289, 1299 (5th Cir. 1987) (when determination of waiver of sovereign immunity requires factual development, court should permit limited discovery and require parties to submit the issue by summary judgment rather than by a motion to dismiss). Wheeler v. Hurdman, 825 F.2d 257 (10th Cir.), cert. denied, 484 U.S 986 (1987) (when subject matter jurisdiction is intertwined with the underlying claim, the issue should be resolved under Rule 12(b)(6) or Rule 56). Thompson Trading Ltd. v. Allied Lyons PLC, 123 F.R.D. 417 (D.R.I. 1989) (In practice, First Circuit district judges regularly consider affidavits and the like in ruling on

motions to dismiss on jurisdictional grounds, an approach which is sound.)

f. Sovereign Immunity.[1]

(1) The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain that suit. United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Sherwood, 312 U.S. 584, 586 (1941).

(2) With regard to the sovereign immunity of officials and agencies of the United States, as opposed to the United States itself, the general rule is that the suit is, in effect, a suit against the United States when the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the government from acting, or compel it to act. Dugan v. Rank, 372 U.S. 609, 620 (1963).

(3) In suits against federal officials for money damages directly under the Constitution (Bivens suits), the principle of sovereign immunity does not apply, since the suit is against the federal official personally (i.e., in his individual capacity as opposed to his official capacity.) Kenner v. Holder, WL 6617331 (S.D.Ca. 2012) (Dugan exception to the doctrine of sovereign immunity does not apply when plaintiffs sue federal officials in their official capacity, not as individuals.).

(4) Commonly asserted provisions that waive sovereign immunity:

- The Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491(a)(1).
- The Federal Tort Claims Act, 28 U.S.C. § 1346(b).
- The Freedom of Information Act, 5 U.S.C. § 552.

[1] May also be asserted as failure to state a claim under Rule 12(b)(6).

- The Privacy Act, 5 U.S.C. § 552a.

- The Unjust Conviction Act, 28 U.S.C. §§ 2513, 1495.

- The Equal Access to Justice Act, 28 U.S.C. § 2412(b) & (d); 5 U.S.C. § 504.

- The Civil Rights Act of 1991.

- The Administrative Procedure Act (APA), 5 U.S.C. § 701, et seq. However, the APA does not contain a specific jurisdictional grant. 28 U.S.C. § 1331 (federal question jurisdiction) can furnish the basis for a suit under the APA. See Califono v. Sanders, 430 U.S. 99 (1977) (addressing the causes of action available under the APA); Gochnour v. Marsh, 754 F.2d 1137 (5th Cir. 1985).

(5) Commonly asserted provisions that *do not* waive sovereign immunity for monetary relief:

- The federal question jurisdiction statute, 28 U.S.C. § 1331. See, e.g., Gilbert v. Dagrossa, 756 F.2d 1455 (9th Cir. 1985).

- The commerce and trade regulation statute, 28 U.S.C. § 1337. See, e.g., Hagemeier v. Block, 806 F.2d 197 (8th Cir. 1986), cert. denied, 481 U.S. 1054 (1987).

- The civil rights jurisdiction statute, 28 U.S.C. § 1343. See, e.g., Beale v. Blount, 461 F.2d 1133 (5th Cir. 1972).

- The mandamus statute, 28 U.S.C. § 1361. See, e.g., Doe v. Civiletti, 635 F.2d 88 (2d Cir. 1980).

- The Declaratory Judgment Act, 28 U.S.C. § 2201-02. See, e.g., Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1952); Mitchell v. Ridell, 402 F.2d 842 (9th Cir. 1968).

- The Constitution. See, e.g., United States v. Testan, 424 U.S. 392 (1976).

(6) Any waiver of sovereign immunity must be strictly construed in favor of the United States. A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." United States v. Mitchell, 445 U.S. 535, 538 (1980); see Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990) (noting that the Sup. Ct. has allowed equitable tolling "in situations where the claimant has been induced or tircked by his adversary's conduct into allowing the filing deadline to pass"). It must be contained in statutory language that is "specific and express." United States v. King, 395 U.S. 1, 4 (1969) (superseded by Contract Disputes Act of 1978, 41 U.S.C. §§ 601-13, and before the Tucker Act 28 U.S.C. § 1491, which provide for Claims Court jurisdiction over naked default termination claims). For this reason, the waiver cannot be enlarged beyond the boundaries that the statutory language plainly requires. United States v. Nordic Village, Inc., 503 U.S. 30, 34 (1992); see also Lane v. Pena, 518 U.S. 187, 191-92 (1996). Waivers of the Government's sovereign immunity, "are not generally to be 'liberally construed.'" Nordic Village, 503 U.S. at 34. Instead, "the Government's consent to be sued 'must be construed strictly in favor of the sovereign.'" Id. (quoting Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983)); but see In re Anton Motors, Inc., 177 B.R. 58 (Bkrtcy.D.Md.1995) (New 11 U.S.C. § 104(a) added by § 113 of the Bankruptcy Reform Act of 1994 effectively overrules Nordic Village); see also Ardestani v. INS, 502 U.S. 129, 137 (1991) ("[a]ny such waiver must be strictly construed in favor of the United States").

(7) Congressional conditions on waivers of sovereign immunity are jurisdictional prerequisites to suit. United States v. Dalm, 494 U.S. 596 (1990); Block v. North Dakota, 461 U.S. 273 (1983); Lehman v. Nakshian, 453 U.S. 156 (1981) (in action against United States, plaintiff has a right to trial by jury only where Congress has affirmatively and unambiguously granted the right by statute); United States v. Kubrick, 444 U.S. 111 (1979). However, see Irwin v. Veterans Administration, 498 U.S. 89 (1990), which held that the 30-day requirement for

filing suit in an EEO case against the government can be equitably tolled.

g. Failure to Exhaust Administrative Remedies.[2]

(1) Statutory Exhaustion Requirement. When the statute itself specifically requires exhaustion of administrative remedies prior to bringing a judicial action, then exhaustion is mandatory. McCarthy v. Madigan, 503 U.S. 140 (1992) (Note: At the time of the McCarthy decision, federal law only required state inmates filing civil rights actions pursuant to 42 U.S.C. 1983 to exhaust administrative remedies. Congress amended PLRA in 1997; see Moore v. Smith, 18 F.Supp.2d 1360 (N.D.Ga.1998) (noting amendments to 42 U.S.C. 1997(e) replaced language allowing courts to enforce exhaustion requirements "if appropriate and in the interests of justice" with mandatory language of "[n]o action shall be brought"). Examples:

- Presentation of a Federal Tort Claim to the administrative agency. 28 U.S.C. § 2675.
- Administrative processing of a Title VII complaint of discrimination. 42 U.S.C. § 2000e-16(c).
- Administrative claims for social security disability. 42 U.S.C. § 405(g).

(2) Judicially Mandated Exhaustion. If there is no statute which establishes an administrative remedy, or if the statute does not clearly mandate exhaustion, the court may balance the various factors set out in McCarthy v. Madigan, *supra*, to determine whether administrative exhaustion required. The court will not require exhaustion when the interests of the individual in retaining prompt access outweighs the institutional interests favoring exhaustion, or when undue prejudice exists to the subsequent assertion of court action, such as when there is an unreasonable or indefinite time frame for administrative action, or the administrative remedy is inadequate, or the

[2] May also be asserted as failure to state a claim under Rule 12(b)(6).

administrative body is shown to be biased or to have predetermined the issue.

(3) When judicial review of an agency decision is sought under the APA, and the statute or agency rules do not require exhaustion, no judicially-created exhaustion requirement can be imposed. See Darby v. Cisneros, 509 U.S. 137 (1993). See also 5 U.S.C. § 704. But, Darby may have limited applicability to the military. See Saad v. Dalton, 846 F. Supp. 889 (S.D. Cal. 1994) (holding that "review of military personnel actions . . . is a unique context with specialized rules limiting judicial review," and citing Chappell v. Wallace, 462 U.S. 486 (1983)). In some circuits, the military services may continue to assert the exhaustion doctrine as a defense, seeking to distinguish Darby--which was not a military case. See E. Roy Hawkens, *The Exhaustion Component of the Mindes Justiciability Test Is Not Laid to Rest by Darby v. Cisneros*, 166 Mil. L. Rev. 67 (2000) (arguing that Darby is inapplicable to military claims). But see Crane v. Sec'y of Army, 92 F.Supp.2d 155, 161 (W.D. N.Y. 2000) ("Almost without exception, federal courts throughout this country have also declined to create a military exception to the Court's decision in Darby.").

(4) What remedies must be exhausted?

- Boards for Correction of Military Records. 10 U.S.C. § 1552.
- Discharge Review Boards. 10 U.S.C. § 1553.
- Article 138, UCMJ. 10 U.S.C. § 938.
- Clemency Boards. 10 U.S.C. §§ 874, 951-954.
- Inspector General. 10 U.S.C. § 3039.

(5) Exceptions to the exhaustion doctrine:

- Inadequacy. Von Hoffburg v. United States, 615 F.2d 633 (5th Cir. 1980).
- Futility. Compare Watkins v. United States Army, 541 F.Supp. 249 (W.D. Wash. 1982) and

Steffan v. Cheney, 733 F.Supp. 115 (D.D.C. 1989) with Schaefer v. Cheney, 725 F.Supp. 40 (D.D.C. 1989).

- Irreparable injury. Hickey v. Commandant, 461 F.Supp. 1085 (E.D. Pa. 1978).

- Purely legal issues. Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975).

- Avoiding piecemeal relief. Walters v. Secretary of the Navy, 533 F.Supp. 1068 (D.D.C. 1982), rev'd on other grounds, 725 F.2d 107 (D.C. Cir. 1983).

(6) Example of Rule 12(b)(1) motion in DoD litigation: Hoery v. United States, 324 F.3d 1220 (10th Cir. 2003) (reversing district court's order granting government's motion to dismiss for lack of subject matter jurisdiction, and holding that landowner's cause of action under FTCA continued to accrue, for limitations purposes, until removal of toxic chemicals was accomplished).

h. Standing.[3]

(1) The standing inquiry has constitutional, statutory, and judicially formulated components. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) (standing subsumes a blend of constitutional requirements and prudential considerations).

(2) In the constitutional sense, Article III requires that a plaintiff have suffered an injury which is redressable by the court. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). An asserted right to have the government act in accordance with the law does not confer standing. Allen v. Wright, 468 U.S. 737 (1984); Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208 (1978).

[3] Sometimes asserted as failure to state a claim under Rule 12(b)(6), but more properly brought as Rule 12(b)(1) motion. See Lipsman v. Secretary of the Army, 257 F.Supp.2d 3, 5 (D.D.C. 2003) ("A challenge to the standing of a party, when raised as a motion to dismiss, proceeds pursuant to Rule 12(b)(1).").

(3) In general, in order for the plaintiff to have standing, the plaintiff must show that the challenged action has caused him injury in fact (that he has personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant), and that the interest sought to be protected by him is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Lujan v. National Wildlife Federation, 497 U.S. 871 (1990); Meese v. Keene, 481 U.S. 465 (1987); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152-53 (1970).

(4) A plaintiff may not claim standing to vindicate the constitutional rights of third parties. Tileston v. Ullman, 318 U.S. 44 (1943). A plaintiff may only challenge a statute or regulation in terms in which it is applied to him. Parker v. Levy, 417 U.S. 733 (1974); Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981). Exception: if statute confers third–party standing. Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

i. Lack of Ripeness (no justiciable case or controversy).[4]

(1) "The conclusion that an issue is not ripe for adjudication ordinarily emphasizes a prospective examination of the controversy which indicates that future events may affect its structure in ways that determine its present justiciability, either by making a later decision more apt or by demonstrating directly that the matter is not yet appropriate for adjudication by an article III court." L. Tribe, American Constitutional Law 61 (2d Ed. 1988) (emphasis in original).

(2) Rationale: Avoid premature litigation of suits and protect agencies from unnecessary judicial interference. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), rev'd on other grounds, Califano v. Sanders, 430 U.S. 99 (1977).

[4] May also be asserted as failure to state a claim under Rule 12(b)(6).

(3) In determining whether a case is ripe for adjudication, a court must evaluate the fitness of the issues for judicial decision and determine the hardship to the parties of withholding court decision. Abbott, *infra*.

(4) Examples: Hastings v. Judicial Conference, 770 F.2d 1093 (D.C. Cir. 1985); Watkins v. United States Army, No. C-81-1065R (W.D. Wash. Oct. 23, 1981).

j. Mootness (no justiciable case or controversy).[5]

(1) "Mootness looks primarily to the relationship between past events and the present challenge in order to determine whether there remains a 'case or controversy' that meets the article III test of justiciability." L. Tribe, American Constitutional Law 62 (1988).

(2) General rule: there is no case or controversy once the issues in a lawsuit have been resolved.

(3) Test: a case becomes moot when: "it can be said with assurance that there is no reasonable expectation … that the alleged violation will recur" and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. 625, 635 (1979).

(4) Exceptions:

- Capable of repetition, yet evading review. Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (class action the only exception to the mootness doctrine); but see Lynch v. United States, 557 A.2d 580 (D.C. 1989) (declining to follow Weinstein on state law grounds).

- Voluntary cessation. United States v. W.T. Grant Co., 345 U.S. 629 (1953); Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144 (D.D.C. 1976).

[5] May also be asserted as failure to state a claim under Rule 12(b)(6).

- Collateral consequences. Sibron v. New York, 392 U.S. 40 (1968); Connell v. Shoemaker, 555 F.2d 483 (5th Cir. 1977). Class actions. Sosna v. Iowa, 419 U.S. 393 (1975)(mootness of the class representative's claim after the class has been certified – the case is not moot); United States Parole Commission v. Geraghty, 445 U.S. 388 (1980) (mootness of class representative's claim after motion for class certification made and denied but before appeal from the denial – the case is not moot); Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128 (1975) (mootness of class representative's claim before class certification – the case may be moot).

k. No remedy; exclusive remedy.[6]

(1) Judicial review may be foreclosed when the statute which creates the rights does not authorize judicial review. See Califano v. Sanders, 430 U.S. 99 (1977) (no judicial review of decisions of the Secretary of HHS to deny a petition to reopen).

(2) When Congress has specially crafted a comprehensive statutory scheme, it is generally the only avenue for judicial action. See Brown v. General Services Administration, 425 U.S. 820 (1976) (Title VII is the exclusive remedy for discrimination in federal employment).

l. Incorrect Defendant.[7]

(1) The only proper defendant in a suit under the FTCA is the United States.

(2) Under the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, federal employees cannot be held responsible for common law torts. Exclusive remedy is against the United States under the FTCA. See 28 U.S.C. § 2679(b).

(3) The head of the agency is the only appropriate defendant in a Title VII case.

[6] May also be asserted as failure to state a claim under Rule 12(b)(6).
[7] May also be asserted as failure to state a claim under Rule 12(b)(6).

3. Lack of jurisdiction over the person. Fed. R. Civ. P. 12(b)(2).

   a. For suits against the United States, its agencies and officers, the issue arises in the context of whether there has been sufficient process or service of process upon the government such that the court has jurisdiction over the "person" of the United States.

   b. For suits against United States officers in their personal or individual capacities (Bivens suits), this defense is important to consider. May be asserted when an individual is sued in a forum other than where he or she resides or is otherwise amenable to personal jurisdiction.

   c. Personal jurisdiction, unlike subject matter jurisdiction, is waivable and must be asserted by the defendant. Petrowski v. Hawkeye-Sec. Ins. Co., 350 U.S. 495 (1956).

   d. Whether personal jurisdiction over a nonresident defendant is present will depend upon the state long-arm statute and whether the defendant has sufficient "minimum contacts" with the forum to satisfy due process. See International Shoe Co. v. Washington, 326 U.S. 310 (1945).

      (1) The plaintiff must comply with the requirements of the state long-arm statute, and

      (2) Maintaining the action must not offend "traditional notions of fair play and substantial justice."

4. Improper venue. Fed. R. Civ. P. 12(b)(3).

   a. Generally, actions against the United States, its officers and agencies, can be brought where the defendant resides, where the cause of action arose, where any real property involved is located, or, if no real property is involved, where the plaintiff resides. 28 U.S.C. § 1391(e). In Bivens cases, section 1391(e) does not apply, and venue is a very important consideration.

   b. Like personal jurisdiction, the defense of improper venue may be waived if not raised in a pre-answer motion or in the answer itself. Fed. R. Civ. P. 12(h)(1).

   c. Actions under the FTCA can be brought only where the plaintiff resides or where the act or omission occurred. 28 U.S.C. § 1402(b).

d. Tucker Act claims brought in the district court can only be brought in the district where the plaintiff resides. 28 U.S.C. § 1402(a)(1).

e. Compare a motion to dismiss under 12(b)(3) with a motion to transfer venue under 28 U.S.C. §§ 1404(a) or 1406(a).

5. Insufficiency of process. Fed. R. Civ. P. 12(b)(4).

a. The complaint and summons together constitute "process." Fed. R. Civ. P. 4(b) sets out the required form of the summons.

b. Rule 12(b)(4) motions challenge the form of the process; if process is defective, plaintiff has failed to perfect personal jurisdiction over the defendant.

c. Rather than dismiss the action, courts will often quash the service and allow plaintiff to re-serve the defendant. Bolton v. Guiffrida, 569 F. Supp. 30 (N.D. Cal. 1983); Boatman v. Thomas, 320 F. Supp. 1079 (M.D. Pa. 1971).

6. Insufficiency of service of process. Fed. R.Civ. P. 12(b)(5).

a. Challenge to the manner in which process is served. Has the plaintiff complied with Rule 4? See Bryant v. Rohr Ind., Inc., 116 F.R.D. 530 (W.D. Wash. 1987) (case dismissed without prejudice because of *pro se* plaintiff's failure to show good cause for his failure to comply with requirements of Rule 4).

b. Like Rule 12(b)(4), courts generally will quash the service and retain the case and provide plaintiff with another opportunity to perfect service. Daley v. ALIA, 105 F.R.D. 87 (E.D.N.Y. 1985); Hill v. Sands, 403 F. Supp. 1368 (N.D. Ill. 1975). But see Lovelace v. Acme Markets, Inc., 820 F.2d 81 (3d Cir.), cert. denied, 484 U.S. 965 (1987) (dismissal for failure to serve process within 120 days effectively terminates suit with prejudice if statute of limitations has expired). Accord Townsel v. Contra Costa County, Cal., 820 F.2d 319 (9th Cir. 1987).

c. In litigation against the United States, its agencies and officers, consider:

(1) Has the U.S. Attorney been served with a copy of the summons and complaint by hand delivery or by registered or certified mail directed to the appropriate person in accordance with Rule 4(i)?

(2) Has the Attorney General been served by registered or certified mail in accordance with Rule 4(i)?

(3) Are individual defendants being sued in their official or individual capacities?

(a) Official capacity service can be accomplished by certified mail under 28 U.S.C. § 1391(e), or pursuant to Rule 4(i)(2)(A).

(b) Individual capacity service must be perfected as required for any other private party. If the complaint arguably implicates official activities of the individually-named federal officer defendant, service on the United States is also be required. Fed. R. Civ. P. 4(i)(2)(B).

(4) Has service been made within 120 days of filing? See Lambert v. United States, 44 F.3d 296 (5th Cir.1995)(Plaintiff's first FTCA action dismissed for failure to effect service IAW Rule 4(i) within 120 days and second FTCA action filed against United States dismissed as untimely under FTCA's six month statute of limitations).

7. Failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

a. The modern equivalent to the demurrer.

b. Old Standard - The motion will be granted only if the defendant can demonstrate that the plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957); Carter v. Cornwell, 983 F.2d 52 (6th Cir. 1993).

c. New Standard - a complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)); see also Weber v. Dept. of Veterans Affairs, 512 F.3d 1178, 1181 (9th Cir. 2008). "A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action' will not do." Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 555) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice"). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (quoting Twombly at 556). A complaint also must contain allegations giving defendants "fair notice of what the ... claim is and the grounds upon which it rests." Id. at 1961 (quoting Twombly at 555).

d. Factual allegations of the complaint are assumed to be true and all reasonable inferences are made in favor of the nonmoving party. United States v. Gaubert, 499 U.S. 315, 327 (1991). Legal conclusion masquerading as factual allegations are not deemed to be true. See Iqbal, 129 S. Ct. at 1949 (citing Twombly at 555); see also Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 2007) ("Conclusory allegations and unreasonable inferences . . . are insufficient to defeat a motion to dismiss."); Taylor v. F.D.I.C., 132 F.3d 753, 762 (D.C. Cir. 1997).

e. The court's inquiry is limited to the four corners of the complaint; if the court considers matters outside the pleadings, the motion is treated as one for summary judgment under Fed. R. Civ. P. 56. California v. American Stores Co., 872 F.2d 837 (9th Cir.); J.M. Mechanical Corp. v. United States, 716 F.2d 190 (3d Cir. 1983); Biesenbach v. Guenther, 588 F.2d 400 (3d Cir. 1978); Fed. R. Civ. P. 12(b).

f. In the context of Bivens claims and claims alleging fraud, conspiracy, and other civil rights violations, a heightened pleading standard applies, and the operative facts upon which the claim is based must be pled. Mere conclusory allegations are insufficient. See Harlow v. Fitzgerald, 457 U.S. 800 (1982).

g. In a Bivens action, the plaintiff must plead the personal involvement of each defendant and vicarious liability is not allowed. Bivens v. Six Unknown, Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 390 n.2 (1971).

h. Examples of Rule 12(b)(6) motions in federal litigation:

(1) Absolute official immunity: If allegations of the complaint contain all of the facts upon which the defense of absolute immunity is based, dismissal under Rule 12(b)(6) is appropriate. Imbler v. Pachtman, 424 U.S. 409 (1976) (state prosecuting attorney entitled to absolute immunity when he is "initiating and pursuing criminal prosecution").

(2) Nonjusticiable "political questions": Subject matter jurisdiction is present because the matter is a "case or controversy" under Article III, but is otherwise unsuited for judicial resolution because of a constitutional commitment to another branch of government. Gilligan v. Morgan, 413 U.S. 1 (1973).

(3) Feres-based immunity of military officers from Bivens actions brought by their subordinates. Cf. Chappell v. Wallace, 462 U.S. 296 (1983). But see Wright v. Park, 5 F.3d 586 (C.A.1 (Me.) 1993). "To call the Feres doctrine an exception is an oversimplification. Feres is a judge-made exception to the [FTCA], itself a statutory waiver of sovereign immunity from tort liability. Thus, if tort liability is the rule, Feres created an exception to an exception to an exception." Id. at 591 n.5.

(4) Nonreviewable military activities: Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971) (overruled on other grounds).

(5) FTCA cases that fail to allege a cause of action under state law: Davis v. Dep't of Army, 602 F. Supp. 355 (D. Md. 1985).

8. Failure to join a party under Rule 19. Fed. R. Civ. P. 12(b)(7).

9. Timing and waiver of Rule 12(b) motions. Fed. R. Civ. P. 12(h).

a. 12(b) defenses "may at the option of the pleader be made by motion." However, a motion raising any of the defenses enumerated in that section "shall be made before pleading if a further pleading is permitted." Fed. R. Civ. P. 12(b).

b. If a motion is filed under Rule 12 and the movant omits therefrom the defense of lack of personal jurisdiction, improper venue, insufficiency of process, or insufficiency of service of process, the defense is waived. Fed. R. Civ. P. 12(g) & (h)(1). See Guccione v. Flynt, 618 F. Supp. 164 (S.D.N.Y. 1985) (failure to raise lack of personal jurisdiction in a motion challenging insufficiency of service of process constitutes a waiver of the defense of lack of personal jurisdiction). Failure to include lack of personal jurisdiction, improper venue, insufficiency of process, or insufficiency of service of process in the answer if no Rule 12 motion is filed constitutes waiver. Fed. R. Civ. P. 12(h)(1). See also Benveniste v. Eisman, 119 F.R.D. 628 (S.D.N.Y. 1988) (insufficiency of service waived even though preserved in the answer but not presented to the court for resolution until almost four years after the action was commenced).

C. Motion for Judgment on the Pleadings. Fed. R. Civ. P. 12(c).

1. A Rule 12(c) motion challenges the legal sufficiency of the opposing party's pleadings.

2. On motion for judgment on the pleadings, court must accept all factual allegations of the complaint as true and motion is granted when movant is entitled to judgment as a matter of law. Westlands Water District v. U.S. Dep't of Interior, 805 F.Supp. 1503, 1506 (E.D. Cal. 1992), aff'd 10 F.3d 667 (9th Cir. 1993).

3. If matters outside the pleading are presented to and not excluded by the court, motion is treated as one for summary judgment and disposed of as provided in Rule 56. Fed. R. Civ. P. 12(c); Latecoere International, Inc. v. U.S. Dep't of Navy, 19 F.3d 1342, 1356 (11th Cir. 1994).

D. Other Rule 12 Motions.

1. Motion for more definite statement. Fed. R. Civ. P. 12(e). Proper when pleading to which a responsive pleading is permitted is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading."

2. Motion to strike. Fed. R. Civ. P. 12(f).

a. When? Before responding to a pleading or, if no response permitted, within 20 days of service.

b. What? Any "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

E. Motion for Summary Judgment. Fed. R. Civ. P. 56.

1. Summary judgment disposes of cases where there is no dispute as to any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

2. Since summary judgment precludes trial of the case and thus denies litigants their "day in court," it is sometimes referred to as a "drastic" or "extreme" remedy. See Jones v. Nelson, 484 F.2d 1165 (10th Cir. 1973); U.S. v. Porter, 581 F.2d 698 (8th Cir. 1978). BUT, in Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986), the Supreme Court instructed that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"

3. Moving party's burden is to show that there is no dispute as to a genuine issue of material fact and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; United States v. One Tintoretto Painting, 691 F.2d 603, 606 (2d Cir. 1982). But see United States v. An Antique Platter of Gold, 991 F.Supp. 222 (S.D.N.Y. 1997) (pointing out that Tintoretto relied on dicta, which the Supreme Court has since stated should not be relied on to create an innocent owner defense (Bennis v. Michigan, 516 U.S. 442 (1996)).

a. Substantive law will identify which facts are material, and only disputes over facts that might affect the outcome of the case will properly prevail on summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

b. Burden is met by the pleadings, depositions, answers to interrogatories, admissions, and any affidavits submitted by the movant in support of the motion. Bell v. Dillard Dep't Stores, Inc., 85 F.3d 1451 (10th Cir. 1996).

c. Moving party is entitled to summary judgment if after adequate time for discovery the party who will have the burden of proof at trial on an essential element cannot make a showing sufficient to establish the existence of that element. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

4. The responding party need only show a dispute as to a genuine issue of material fact to defeat the motion.

a. Materials submitted in support of the motion should be viewed in light most favorable to the non-moving party and all reasonable inferences should be drawn in his favor. Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970). See also Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358 (C.A.3.Pa., 1992).

b. Once a motion has been made and supported by depositions, admissions, affidavits, etc., the opposing party cannot rest upon the allegations in the pleadings; he must respond with affidavits and evidence of his own to create a material issue of fact. Fed. R. Civ. P. 56(e). Adler v. Glickman, 87 F.3d 956 (7th Cir. 1996).

c. When the primary issue is one of intent or state of mind, summary judgment is generally inappropriate. Suydam v. Reed-Stenhouse of Wash., Inc., 820 F.2d 1506 (9th Cir. 1987).

d. When the non-moving party has the burden of proof at trial, the moving party may carry its burden at summary judgment either by presenting evidence negating an essential element of the non-moving party's claim or by pointing to specific portions of the record which demonstrate that the non-moving party cannot meet its burden of proof at trial. Anderson v. Radisson Hotel Corp., 834 F.Supp. 1364 (S.D.Ga. Jun 21 1993) (citing Clark, 929 F.2d at 606-608 (explaining Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) and Celotex Corp v. Catrett, 477 U.S. 317 (1986)).

5. Rule 56 – December 2010 Amendments

a. Previously, Rule 56 provided, unless court order or local rules state otherwise, a response to MSJ was due within 21 days and reply to the response was due within 14 days Amended Rule 56: No default response time lines.

b. Previous Rule 56(f) addressed a situation when nonmovant was not able to respond to MSJ because specific facts that need to be developed. Amended Rule 56 now addresses this situation in Rule (d). Distinction is important when doing research and talking with older AUSAs.

c. Amended Rule 56(e) merely articulates practice that is common in most jurisdictions. When a party opposing MSJ does not contest a fact, the district court has the authority to: grant the party the opportunity to support the fact with the supplemental filings, consider the fact undisputed, grant MSJ, or issue an appropriate order. Rule 56(e).

V. CONCLUSION.

FEDERAL LITIGATION COURSE

TAB D

DISCOVERY THEORY & PRACTICE

I. DISCOVERY: SCOPE, LIMITATIONS, SANCTIONS AND SUPPLEMENTATION

A. Scope and Limits of Discovery.

1. Scope: Fed. R. Civ. P. 26(b)(1):

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

a. "Relevancy" in the context of Fed. R. Civ. P. 26(b)(1) is broadly construed.

(1) "[A]ny matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case . . . [is relevant] . . . [D]iscovery is not limite d to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues . . . Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits." Oppenheimer Fund, Inc., v. Sanders, 437 U.S. 340, 351 (1978) (citations omitted).

(2) "Relevant to the subject matter" is synonymous with "germane." Wright & Miller, Federal Practice and Procedure: Civil § 2008 (1985). But see Steffan v. Cheney, 920 F.2d 74 (D.C. Cir. 1990).

(3) Inadmissibility at trial is not grounds for objection to discovery if the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." See Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978) (Engineering document which was not produced during discovery and which contained references to other documents which were not produced so that discovery of original document would, at a minimum, have led to the discovery of additional documents was reasonably calculated to lead to the discovery of admissible evidence).

b. Privileged material is generally not discoverable.

(1) Privileges in the discovery context refer to those privileges found in the law of evidence. See U.S. v. Reynolds, 345 U.S. 1, 6 (1953). Fed. R. Evid. 1101(c) ("The rules on privilege apply to all stages of a case or proceeding.").

(2) Claims of privilege must be made in writing and with specificity. The party claiming the privilege must "describe the nature of the documents, communications, or things not produced or disclosed in a manner that . . . will enable other parties to assess the applicability of the privilege or protection. Fed. R. Civ. P. 26(b)(5).

(3) The privileges which may properly be invoked depend on the nature of action. Fed. R. Evid. 501.

(a) If federal law governs the action, (e.g., federal question cases) the privileges recognized by federal common law apply. See Heilman v. Waldron, 287 F.R.D. 467, 473-74 (D. Minn. 2012).

(b) If state law provides the rule of decision, either as to an element of the claim or a defense, (e.g., cases brought under diversity jurisdiction) then the privileges recognized under state law apply. See Heilman v. Waldron, 287 F.R.D. 467, 473-74 (D. Minn. 2012).

(c) When a federal court applies state law in a non-diversity case, e.g., in an FTCA action, it does so by adopting the state rule as federal law, thus "state law" does not provide the rule of decision within the meaning of Fed. R. Evid. 501 and federal law governs the privilege issue. Whitman v. United States, 108 F.R.D. 5, 6 (D.N.H. 1985); Mewborn v. Heckler, 101 F.R.D. 691, 693 (D.D.C. 1984). See generally Wright & Graham, Federal Practice and Procedure, Evidence § 5433.

(d) Exception: Work product immunity is governed by federal law, even in diversity (state law) cases. See EDO Corp. v. Newark Ins. Co., 145 F.R.D. 18 (D. Conn. 1992).

(4) Privileges which typically arise in government litigation include:

(a) Military and State Secrets Privilege:

i) Privilege belongs to the government and must be asserted by it.

ii) To assert the privilege, it must be (1) a formal claim of privilege, (2) lodged by the head of the department that has control over the matter, and (3) after actual personal consideration. United States v. Reynolds, 345 U.S. 1 (1953). See also Coastal Corp. v. Duncan, 86 F.R.D. 514 (D. Del. 1980); Yang v. Reno 157 F.R.D. 625 (M.D. Pa. 1994).

(b) Intra-agency advisory opinions, or the so-called "deliberative process privilege:"

i) Asserted in the same manner as state secrets privilege.

ii) Designed to protect internal decision-making process and thus encourage full and free discussions of the various issues and policies by the participants.

iii) Two requirements: (1) information must be deliberative, and (2) the information must be pre-decisional. See Olmsted v. McNutt, 188 F.R.D. 386 (D. Colo. 1999).

iv) Commonly used to protect aircraft accident safety investigations from disclosure. See United States v. Weber Aircraft, 465 U.S. 792 (1984); Machin v. Zuckert, 316 F.2d 336 (D.C. Cir. 1963), cert. den'd, 375 U.S. 896 (1963).

v) Caveat: If deliberations are in issue, they may be discoverable. See Dep't of Econ. Dev. v. Arthur Andersen & Co., 139 F.R.D. 295 (S.D.N.Y. 1991).

(c) Work Product Privilege:

i) Protects documents and tangible things prepared by a party, his attorney, agent, or representative, when done in anticipation of litigation or for trial. Fed. R. Civ. P. 26(b)(3); Hickman v. Taylor, 329 U.S. 495 (1947). See Leonen v. Johns-Manville, 135 F.R.D. 94 (D.N.J. 1990).

ii) May be overcome if the party seeking discovery has a substantial need for the materials sought and is unable, without undue hardship, to obtain the substantial equivalent by other means. Raso v. CMC Equip. Rental Inc., 154 F.R.D. 126 (E.D. Pa. 1994). Contemporaneous statements are typically so unique as to allow for no "substantial equivalent." Wright & Miller, Federal Practice & Procedure, Civil § 2025. Duck v. Warren, 160 F.R.D. 80 (E.D. Va. 1995).

iii) Even where a showing of need compels production, the impressions, conclusions and opinions of counsel are protected (absent fraud). In re Doe, 662 F.2d 1073 (4th Cir. 1981); FDIC v. Singh, 140 F.R.D. 252 (D. Me. 1992); Diamond State Ins. Co. v. Rebel Oil Co. 157 F.R.D. 691 (D. Nev. 1994). But cf. William Penn Life Assur. v. Brown Trans. & Storage, 141 F.R.D. 142 (W.D. Mo. 1990). See also In re San Juan DuPont Plaza Hotel Fire Lit., 859 F.2d 1007 (1st Cir. 1988); Shelton v. AMC, 805 F.2d 1323 (8th Cir. 1986).

iv) A disclosure by the client or even by counsel to someone other than an adversary does not waive protection. See Westinghouse Elec. Corp. v. Rep. of Philippines, 951 F.2d 1414 (3rd Cir. 1991); Khandji v. Keystone Resort Mgt. Inc., 140 F.R.D. 697 (D. Colo. 1992); Data General Corp. v. Grumman Systems Corp., 139 F.R.D. 556 (D. Mass. 1991); Catino v. Travelers Ins. Co., 136 F.R.D. 534 (D. Mass. 1991).

(d) Attorney-Client Privilege:

i) Protects communications between an attorney and the client when made in connection with securing a legal opinion or obtaining legal services. See Upjohn Co. v. U.S., 449 U.S. 383 (1981).

ii) Privilege applicable in the government setting. See Green v. IRS, 556 F. Supp. 79 (N.D. Ind. 1982), aff'd, 734 F.2d 18 (7th Cir. 1984).

iii) Disclosure to any third party waives privilege. See In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982) (Partial disclosure of otherwise privileged information waives privilege with respect to all communications regarding related subject matter), Harding v. Dana Transport, Inc. 914 F.Supp. 1084 (D.N.J. 1996); Draus v. Healthtrust, Incorporated-The Hosp. Co., 172 F.R.D. 384 (S.D. Ind. 1997) (Inadvertent disclosure waives the privilege).

(e) Medical Quality Assurance Records Privilege: Records created in a medical quality assurance program are confidential and privileged; they may be disclosed only as provided by statute. 10 U.S.C. § 1102. See W. Woodruff, The Confidentiality of Medical Quality Assurance Records, The Army Lawyer, May 1987, at 5; In re United States of America, 864 F.2d 1153 (5th Cir. 1989).

2. Mandatory disclosures under Fed. R. Civ. P. 26(a). Certain material must be disclosed to other parties, even absent a request for it.

a. **Initial disclosures.** Without receiving a discovery request and at or within 14 days of the meeting of the parties to plan for discovery held under Rule 26(f) (i.e., usually within 90 days after the defendant makes an appearance), each party must provide:

(1) The name, address and telephone number of witnesses, who are "likely to have discoverable information that the disclosing party may use to support its claims or defenses" and the subjects of which these are knowledgeable;

(2) A copy of any document or a description of any document and all tangible things which the disclosing party may use to support its claims or defenses;

(3) A computation of damages – by damage category, and non-privileged factual material related to the nature and extent of injuries suffered;

(4) A copy of any insurance agreement under which an insurance business may be liable to satisfy any potential judgment.

b. Certain categories of cases are excluded from the initial disclosure requirement. These include:

(1) actions based on an administrative record;

(2) petitions for habeas corpus;

(3) actions brought *pro se* by persons in custody of the United States;

(4) actions to enforce or quash a subpoena or an administrative summons;

(5) actions, by the United States, to recover benefits;

(6) proceedings ancillary to proceedings in other courts;

(7) actions to enforce arbitration awards.

b. A party may not withhold its own initial disclosure because its adversary has failed to comply with this requirement or made an inadequate disclosure.

c. **Expert disclosures**.

(1) The identity of all experts who may be used at trial must be disclosed to the other parties at the time specified by the court, and in no event, less than 90 days before trial.

(a) The disclosure requirement applies to <u>all</u> testifying experts, not just those specially retained or employed;

(b) The scope of the disclosure required for a specially retained expert is substantially greater than for expert witnesses who were not specially retained.

(2) Experts who will present testimony solely to rebut the evidence presented by specially retained witnesses of an adversary may be designated 30 days after the initial expert disclosure, unless the court orders otherwise.

d. **Pretrial disclosures.**

(1) No later than 30 days prior to trial, unless the court orders otherwise, the parties must disclose:

(a) the identification of all "will call" and "may call" witnesses;

(b) a designation of any testimony which is expected to be presented by deposition, and if the deposition was not stenographically transcribed, a transcript of those designated portions;

(c) the identification of all documents or other exhibits expected to be offered or which may be offered at the trial.

(2) Within 14 days after these disclosures are made, the opposing parties may serve objections to the deposition designations and objections to the admissibility of documents and exhibits. Objections to admissibility, other than on the basis of relevancy, not raised are waived.

3. Scope of discovery for expert witnesses: Fed. R. Civ. P. 26(b)(4).

a. Discovery from experts expected to testify.

(1) Parties may depose expert witnesses retained by their adversaries.

(a) If the court requires Rule 26(a)(2) expert reports to be exchanged, the deposition cannot be conducted until the report is provided. See Freeland v. Amigo, 103 F.3d 1271 (6th Cir. 1997).

(b) The party seeking discovery must ordinarily pay the reasonable expenses of the expert in responding to discovery. See Mathis v. NYNEX, 165 F.R.D. 23 (E.D.N.Y. 1996); but see Reed v. Binder, 165 F.R.D. 424 (D.N.J. 1996) (would be manifestly unjust to force indigent plaintiff to pay defendant's excessive number of experts).

(2) Rule 26(a)(2)(B) sets forth the material which must be produced under the mandatory disclosure requirement and, therefore, also describes some of the information ordinarily discoverable, including:

(a) "all of the opinions to be expressed [by the expert] and the basis and reasons therefore;"

(b) "the facts or data considered by the witness;"

(c) "any exhibits to be used as a summary of or support for the opinions;"

(d) the witness' qualifications including "a list of all publications authored by the witness within the preceding ten years;"

(e) the compensation the witness is receiving for "study and testimony," and;

(f) "a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years."

See Nguyen v. IBG, Inc. 162 F.R.D. 675 (D. Kan. 1995).

b. Discovery from retained experts who are not expected to testify is ordinarily prohibited. See Coates v. A.C. & S., Inc., 133 F.R.D. 109 (E.D. La. 1990). Fed. R. Civ. P. 26(b)(4)(B):

> A party may . . . discover facts known or opinions held by an expert who has been retained or specially employed . . . in anticipation of litigation or preparation for trial and who is not expected . . . [to testify at trial], only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable . . . to obtain facts or opinions on the same subject by other means.

(1) In-house experts can be "specially employed" but their pre-retention knowledge and opinions are subject to full discovery. In re Shell Oil Refinery, 134 F.R.D. 148 (E.D. La. 1990).

(2) Providing the work-product of a non-testifying expert to a testifying expert may make it discoverable. See Douglas v. University Hosp., 150 F.R.D. 165, 168 (E.D. Mo. 1993), aff'd 34 F.3d 1070.

B. Limitations on Discovery.

1. Limitations imposed by the rules.

a. **Timing.** Discovery may not be initiated until initial disclosures are made and the parties have conferred to plan for discovery. Fed. R. Civ. P. 26(d). Before the December 2000 amendments to the Rules, this requirement, and many other discovery limitations could be avoided by local district court rules. However, one principal objective of the December 2000 amendments was to establish uniform national discovery practices for federal courts. Thus, many of the requirements imposed by local rules – in contradiction to requirements of the federal discovery rules - are no longer permissible.

b. **Interrogatories**. A party may propound 25 interrogatories, including sub-parts. Fed. R. Civ. P. 33(a).

(1) An interrogatory composed of several sub-sections may be counted as a single interrogatory or as multiple interrogatories. The relevant determination is whether the interrogatory requests information about "discrete separate subjects." Note of Advisory Committee on Rules, 1993 Amendment.

(2) The number of permissible interrogatories can be increased by leave of court or by written stipulation between the parties.

(3) The court may impose different limitations on interrogatories by a case management order.

c. **Depositions.** Plaintiffs, defendants, and third-party defendants are limited to ten depositions in total. Fed. R. Civ. P. 30(a)(2)(A) & 31(a)(2)(A).

(1) Leave of court, or a written stipulation between the parties, is required in order to take:

(a) Depositions in excess of ten;

(b) The deposition of any person in confinement;

(c) The deposition of anyone who has previously been deposed in the case;

(d) A deposition prior to the Rule 26(f) discovery planning conference.

(2) The court may impose different limitations on depositions by a case management order.

3. Limitations imposed by the forum.

a. The court, by a case management order, may alter the limitations on depositions and interrogatories, or may impose restrictions on the length of depositions and the number of requests for admission. Local rules can impose limitations on the number of requests for admission which may be served.

b. The court may also limit discovery, by order or either *sua sponte* or in response to a motion for a protective order under Fed. R. Civ. P. 26(c), if it determines that:

(1) "[T]he discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. P. 26(b)(2)(C)(i). See Baine v. General Motors, 141 F.R.D. 332 (M.D. Ala. 1991); Doubleday v. Ruh, 149 F.R.D. 601 (E.D. Cal. 1993).

(2) "[T]he party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought." Fed. R. Civ. P. 26(b)(2)(C)(ii).

(3) The discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, the importance of the issues at stake in the litigation, and the importance of the discovery sought to the questions at issue. Fed. R. Civ. P. 26(b)(2)(C)(iii). See Rainbow Investors Group, Inc. v. Fuji Trucolor Missouri, Inc., 168 F.R.D. 34 (W.D. La. 1996).

c. The discovery of electronic evidence, particularly "inaccessible electronic evidence," has caused courts to formulate new tests for the determination of whether discovery is "unduly burdensome or expensive," and has encouraged courts to enter orders shifting the cost of discovery to the party seeking the production. See Rowe Entertainment, Inc. v. William Morris Agency, Inc., 205 F.RD. 421 (S.D.N.Y. 2002); Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212 (S.D.N.Y. 2003). In determining whether to shift the costs, courts may consider:

(1) The extent to which the request is narrowed to the discovery of relevant information;

(2) Whether the evidence produced is or was available from other, less costly, sources;

(3) The cost of producing the evidence in relation to the amount in controversy;

(4) The cost of producing the evidence in relation to the resources of each party;

(5) The relative ability of each party to control costs and its incentive to do so;

(6) The significance of the issues at stake;

(7) The relative benefit – to the various parties – of the evidence produced.

See Zubalake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y.2003).

4. Protective orders limiting discovery may also be sought under Rule 26(c), but the party seeking protection bears a substantial burden of showing entitlement. See In re Agent Orange Product Liability Litigation, 104 F.R.D. 559 (E.D.N.Y. 1985). NOTE: Seeking a protective order does not absolve movant of the duty to respond. Williams v. AT&T, 134 F.R.D. 302 (M.D. Fla. 1991).

a. A motion seeking a protective order must be accompanied by a certification that the moving party conferred with the affected parties in an attempt to resolve the dispute.

b. The court has broad discretion in fashioning protective orders. See Brown Bag Software v. Symantec Corp., 960 F.2d 1465 (9th Cir.

1992).

C. Signing Discovery Requests and Responses.

1. "Every disclosure [under Rule 26(a)(1) or (a)(3)] shall be signed by at least one attorney of record . . . The signature . . . constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made." Fed. R. Civ. P. 26(g)(1).

2. Every discovery request, response, or objection shall be signed by at least one attorney of record. Fed. R. Civ. P. 26(g).

"The signature . . . constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

Fed. R. Civ. P. 26(g) (emphasis added). See Brandt v. Vulcan, Inc., 30 F.3d 752, 756, n. 8 (7th Cir. 1994).

3. "Reasonable inquiry" is satisfied if the investigation undertaken by the attorney and the conclusions arrived at are reasonable under the circumstances. The standard is objective, not a subjective "bad faith" test. While the attorney's signature does not certify the truthfulness of the client's factual responses, it does certify that the lawyer has made reasonable efforts to assure that the client has provided all the information and documents available to him that are responsive to the discovery request. See Bernal v. All American Investment Realty, Inc., 479 F.Supp.2d 1291 (S.D. Fla. 2007).

4. If a certification is made in violation of the rule, the court SHALL impose an appropriate sanction upon the person who made the certification. The court may also sanction the party, or the person signing and the party. Sanctions may include an order to pay the reasonable expenses incurred because of the violation, including a reasonable attorney's fee. Fed. R. Civ. P. 26(g)(3). Malautea v. Suzuki Motor Corp., 148 F.R.D. 362 (S.D. Ga. 1991) aff'd 987 F.2d 1536, cert. den'd, 510 U.S. 863. The criteria for awarding sanctions are similar to those under Rule 11. In re Byrd, Inc., 927 F.2d 1135 (10th Cir. 1991); Apex Oil Co. v. Belchor Co. of New York, Inc., 855 F.2d 1009 (2d Cir. 1988).

5. The provisions of Fed. R. Civ. P. 11 do not apply to discovery matters. Fed. R. Civ. P. 11(d).

6. Agency counsel are generally expected to prepare and sign the answers to interrogatories directed to the agency or the United States when the interrogatories seek information within the knowledge of the agency. United States Attorneys Manual § 4-1.440.

D. Supplementing Responses to Discovery.

1. A party has a duty to supplement any disclosures made under Rule 26(a), at appropriate intervals, whenever the party determines that "in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1).

2. Generally, there is no obligation to supplement deposition testimony. However, where an expert's deposition is used in whole or in part to satisfy the disclosure requirement of Fed. R. 26(a)(2), a duty to supplement may arise. See also, Freund v. Fleetwood Enterprises, Inc., 956 F.2d 354 (1st Cir. 1992); Blumenfeld v. Stuppi, 921 F.2d 116 (7th Cir. 1990); Bradley v. United States, 866 F.2d 120 (5th Cir. 1989) (failure to supplement response with identity of expert or substance of his/her facts and opinions may bar use of expert at trial.)

3. Supplementation must be timely ("seasonable"). See Fusco v. General Motors Corp. 11 F.3d 259 (1st Cir. 1993) (providing a videotape related to expert testimony on liability one month before trial not seasonable); Davis v. Marathon Oil Co., 528 F.2d 395 (6th Cir. 1975) (supplementation of witness list three days before trial warrants excluding them as witnesses); Royalty Petroleum Co. v. Arkla, Inc., 129 F.R.D. 674 (D. Okla. 1990) (supplemental interrogatories on eve of trial warranted excluding testimony on that issue).

4. Counsel who fails to take immediate remedial measures when additional or corrective information is discovered risks running afoul of the duty of candor to the tribunal. See United States v. Shaffer Equipment Co., 796 F.Supp. 938 (S.D. W.Va. 1992)(Government CERCLA cost recovery action dismissed because government counsel violated duty of candor to the tribunal), aff'd in part and rev'd in part, 11 F.3d 454 (4th Cir. 1993).

5. Court can order further supplementation of disclosures or discovery responses. Fed. R. Civ. P. 26(e)(1)(B).

E. Sanctions for Discovery Abuses.

1. Automatic Sanctions. "A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Fed. R. Civ. P. 37(c). No motion is required. However, upon motion and after an opportunity to be heard, the court may impose additional sanctions, including:

   a. reasonable expenses, including attorney's fees, and;

   b. advising the jury of the party's failure to disclose the evidence.

2. Sanctions available upon application to the court. Fed. R. Civ. P. 37.

   a. Compelling Discovery. Fed. R. Civ. P. 37(a).

      (1) The court wherein the action is pending or the court for the district where a deposition is being taken, may, upon application, enter an order requiring the discovery to take place as requested.

      (2) A motion is appropriate when:

         (a) The deponent refuses to answer a question posed during a deposition. In such a case, the questioner may adjourn or complete the deposition before seeking the court's intervention.

         (b) A party fails to answer an interrogatory.

         (c) A party refuses to produce documents or allow inspection as requested.

(d) A party fails to designate an individual pursuant to Fed. R. Civ. P. 30(b)(6). See Fed. R. Civ. P. 37(a)(3)(B).

(3) An evasive or incomplete answer is treated as a failure to respond. Fed. R. Civ. P. 37(a)(4).

(4) Any motion to compel must include a certification that the moving party attempted, by conference with the person or party resisting discovery, to resolve the matter before seeking court intervention. Fed. R. Civ. P. 37(a)(1).

(5) In addition to ordering the discovery to take place, the court "shall" order the party or deponent whose conduct necessitated the motion, or the attorney, to pay the moving party the expenses incurred, including a reasonable attorney's fee unless the court finds the opposition was substantially justified or other circumstances make an award unjust. Fed. R. Civ. P. 37(a)(5).

(6) An award of costs shall also be awarded when the discovery is provided after the motion is filed. Fed. R. Civ. P. 37(a)(5).

(7) If the motion to compel is denied, the moving party must pay the costs unless the court finds that the making of the motion was justified or other circumstances makes an award unjust. Fed. R. Civ. P. 37(a)(5)(B).

b. Sanctions for failure to obey the motion to compel.

(1) A deponent who refuses to be sworn or to answer questions after being directed to do so may be held in contempt of court. Fed. R. Civ. P. 37(b)(1). See Mertsching v. U.S., 704 F.2d 505 (8th Cir. 1983).

(2) Oral discovery orders must be complied with and disobedience can give rise to Rule 37 sanctions. Avionc Co. v. General Dynamics Corp., 957 F.2d 555 (8th Cir. 1992); Bhan v. NME Hospitals, Inc., 929 F.2d 1404 (9th Cir. 1991).

(3) Fed. R. Civ. P. 37(b)(2) provides for a wide range of possible sanctions for disobedient parties:

(a) An order establishing facts. See Chilcutt v. U.S., 4 F.3rd 1313 (5th Cir. 1993), reh'g den'd, and cert. den'd 513 U.S. 979. Insurance Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 694 (1982).

(b) An order precluding a party from supporting or opposing a claim or defense or prohibiting him from introducing certain evidence. See Parker v. Freightliner Corp., 940 F.2d 1019 (7th Cir. 1991); Bradley v. U.S., 866 F.2d 120 (5th Cir. 1989); Callwood v. Zurita, 158 F.R.D. 359 (D. Virgin Islands 1994).

(c) An order striking pleadings. See Green v. District of Columbia, 134 F.R.D. 1 (D.D.C. 1991); Frame V. S-H, Inc. 967 F.2d 194 (5th Cir. 1992).

(d) An order staying the proceedings until compliance.

(e) An order dismissing the action or rendering judgment by default against the disobedient party. National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976). But see Fed. R. Civ. P. 55(e) ("No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.") See Metropolitan Opera Association, Inc. v. Local 100, Hotel Employees and Restaurant Employees International Union, 2003 WL 186645 (S.D.N.Y. Jan. 28, 2003).

(f) An adverse jury instruction. See Residential Funding Corp. v. DeGeorge Home Alliance, Inc. 306 F.3d 99 (2nd Cir. 2002).

(g) An order holding the disobedient party in contempt of court.

(h) Monetary sanctions may be imposed on the party, its attorney(s) (including government counsel), or both. U.S. v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365 (9th Cir. 1980); Pereira v. Narragansett Fishing Corp.,135 F.R.D. 24 (D. Mass. 1991); F.D.I.C. v. Conner, 20 F.3d 1376 (5th Cir. 1994) (Government attorney required to pay costs from personal funds.)

(4) Sanctions imposed on party need only be "just" and related to the infraction in question. See Boardman v. National Medical Enterprises, 106 F.3d 840 (8th Cir. 1997)

(5) The "drastic" remedy of dismissal is reserved for the most flagrant violations. In re Exxon Valdez, 102 F.3d 429 (9th Cir. 1996); Bluitt v. ARCO Chemical Co., 777 F.2d 188 (5th Cir. 1985); Spence v. Maryland Cas. Co. 803 F.Supp 649 (W.D.N.Y. 1992) aff'd 995 F.2d 1147. But see Morgan v. Massachusetts General Hosp. Corp., 704 F.2d 12 (1st Cir. 1983). Such actions will only be taken in egregious circumstances (e.g., bad faith, willfulness, or fault). See Refac Intern. Ltd. v. Hitachi Ltd., 921 F.2d 1247 (Fed. Cir. 1990); Monroe v. Ridley, 135 F.R.D. 1 (D.D.C. 1990).

c. A party's failure to attend its own deposition, to answer interrogatories, or to respond to requests for production is immediately sanctionable (i.e., the movant need not first secure an order compelling disclosure). Any of the various sanctions, save contempt, may be imposed. Blue Grass Steel, Inc. v. Miller Bldg. Corp. 162 F.R.D. 493 (E.D. Pa. 1995). Fed. R. Civ. P. 37(d).

d. Expenses upon failure to admit.

(1) If a party refuses to admit the genuineness of a document or the truth of a fact as requested under Fed. R. Civ. P. 36, and the requesting party subsequently proves the genuineness of the document or the truth of the fact, the party refusing to admit may be ordered to pay his opponent's expenses. Fed. R. Civ. P. 37(c)(2). U.S. v. Watchmakers of Switzerland Information Center, Inc. 25 F.R.D. 197 (C.D.N.Y. 1959).

(2) The court "shall" order payment of the reasonable expenses, including attorney's fees, unless it finds that:

(a) The request was objectionable.

(b) The admission sought was of no substantial importance.

(c) The party refusing to admit had reasonable ground to believe he might prevail.

(d) There were other good reasons for the failure to admit. Fed. R. Civ. P. 37(c)(2).

e. The court may require a party or an attorney to pay the reasonable expenses incurred by reason of that party or attorney's failure to confer and assist in the development of a discovery plan. Fed. R. Civ. P. 37(g).

f. The court may impose a sanction upon any person who has "frustrated the fair examination of [a] deponent." The sanction may include reasonable attorneys fees and costs incurred by other parties as a result of the offensive conduct. Fed. R. Civ. P. 30(d)(2).

II. DISCOVERY: STRATEGY, PRACTICE AND PROCEDURE

A. Planning for discovery.

1. Discovery in every case should begin with the formulation of a discovery strategy.

a. The discovery strategy should address the following questions:

(1) What information do I have an affirmative obligation to disclose?

(2) What information do I need to obtain?

(3) Who has the information I need?

(4) In what posture in the litigation do I hope to place my adversary through discovery?

(5) What posture in the litigation do I want to avoid?

(6) What information do I have which my adversary will try to obtain and how can I best marshal and present it or prevent its disclosure?

b. Consider the following when preparing the discovery strategy:

(1) The nature and complexity of the legal issues involved;

(2) The amount in controversy or the importance of the principles and positions being attacked by the adversary;

(3) The strategy for the defense of the case;

(4) The number and nature of the parties in the litigation;

(5) The issues likely to be contested and to be conceded.

c. The discovery strategy must be formulated prior to the Rule 26(f) pre-discovery conference of the parties.

d. Check local rules. The December 2000 amendments to the Rules was intended to standardize discovery practice in the U.S. District Courts. Nevertheless, the implementation of the federal rules governing discovery has always varied widely from district to district and sometimes within each division of a district. The importance of securing an up-to-date copy of the local rules of court cannot be overstated.

(1) Local rules may impose additional or different limits on the frequency and amount of discovery than those imposed by the federal rules. E.g., limitations on the number of requests for admissions a party or local conditions for the 26(f) conference. Although the December 2000 amendments should reduce the number of discovery practice variations, some will surely remain.

(2) The particular format for discovery papers, as well as other pleadings and motions, may be set out in the local rules.

(3) Local rules may memorialize customary discovery time limits, alter the time for objecting to discovery, establish procedures for requesting a discovery conference, and delineate the steps that a party must take to resolve a discovery dispute. They may also require a party to set forth certain information with regard to documents for which a privilege is asserted.

(5) Local rules may provide for "uniform discovery definitions" or uniform discovery that must be answered.

(6) Local rules versus "local practice". Local practices may vary considerably from local rules. Consult with a local practitioner if possible.

2. Rule 26(f) pre-discovery conference and discovery plan.

a. Except in specified excepted cases or where a court order provides otherwise, all parties are required to confer before beginning discovery in any action.

b. The conference should be held "as soon as practicable" but not later than 21 days before a scheduling conference is held or a scheduling order is due. See Fed. R. Civ. P. 16(b). Rule 16(b) orders are required within 90 days of the appearance of the defendant, making a 26(f) conference necessary within the first 69 days after an appearance.

c. Topics to be covered at the conference include the nature of the claims and defenses, the likelihood of settlement or other resolution of the case, the conditions for the exchange of mandatory disclosures, and an appropriate discovery plan for the case.

d. All parties are jointly responsible for providing the court with a report within 14 days of the conference outlining the discovery plan. The plan must include:

(1) any agreements regarding initial disclosures, including a statement of when these were or will be made;

(2) the subjects of future discovery, when discovery will be completed, and whether discovery will be phased or limited to certain subject areas;

(3) whether amendments to the limitations on discovery imposed by the federal rules or by the rules of court are necessary for this case;

(4) whether any protective orders regarding discovery or any scheduling or other Rule 16 order should be entered.

e. Rule 26(f) permits the court, by order or local rule, to require that the conference be held less than 21 days prior to the scheduling conference and to require an oral, rather than written report concerning the discovery plan. This amendment was one of the

few concessions to those districts which have expedited discovery calendars made by the December 2000 amendments.

3. Implement the discovery strategy by outlining the tasks to be performed in sequence.

   a. Complex cases may require a formal discovery planning document assigning tasks and suspense dates to various attorneys involved in the case. In simpler cases, counsel's hand-written notes may suffice as a discovery outline. In any case, the outline should be continuously reviewed and modified as tasks are completed and information is generated.

   b. A complete outline includes provisions for providing mandatory disclosures and for responding to opposing discovery, including marshalling any documents or tangible things expected to be requested by the opposing party, and identifying and interviewing any witnesses who will be identified by opposing counsel.

4. The amount of discovery required will depend upon the specifics of the case and available resources.

5. The discovery outline and its implementation in a given case should serve several purposes:

   a. It should provide you with <u>useful</u> information in a timely manner.

      (1) Facts and testimony should be gathered in time to make effective use of it in subsequent discovery (e.g., expert depositions).

      (2) All of the evidence gathered should be consistent with the theories to be advanced at trial.

   b. It should use your available resources, including time, efficiently.

   c. It should place you in the best negotiating position possible.

   d. It should preserve and advance your defenses.

   e. It should avoid unnecessary and unflattering appearances before the judge.

B. Filing discovery pleadings. Rule 5(d) provides that Rule 26(a) disclosures and discovery pleadings (i.e., all requests and responses, including interrogatories, requests for documents or to permit entry onto land, requests for admissions and depositions) are not filed until they are used in proceeding or filing is ordered by the court.

C. Using the Right Tool for the Right Job (at the right time).

1. Interrogatories (Fed. R. Civ. P. 33).

a. General procedure.

(1) Written questions covering the entire gamut of material and information within the general scope of discovery propounded to a party. Interrogatories directed to a specific agent or employee who is not a named party are improper. Waider v. Chicago, R.I., & P. Ry. Co., 10 F.R.D. 263 (D.C. Iowa 1950).

(2) No more than 25 interrogatories, including all discrete subparts, may be served without leave of the court or agreement of the parties. Check local rules for additional or different requirements.

(3) Unless an objection to the interrogatory is interposed, they must be answered separately and fully under oath. Answers must include all information known by the party or his attorney. See Law v. National Collegiate Athletic Ass'n, 167 F.R.D. 464 (D.Kan. 1996) vacated 96 F.3d 1337; Naismith v. PGA, 85 F.R.D. 552 (D.C. Ga. 1979). When the party is a corporation or a governmental agency, the party can designate an individual to answer the interrogatories and will be bound by the responses. Mangual v. Prudential Lines, Inc., 53 F.R.D. 301 (D.C. Pa. 1971). The attorney for the corporation or governmental agency can answer. Wilson v. Volkswagen of American, 561 F.2d 494, 508 (4th Cir. 1977); Catanzaro v. Masco Corp., 408 F. Supp. 862, 868 (D.C. Del. 1976); United States v. 58.16 Acres of Land, 66 F.R.D. 570 (D.C. Ill. 1975). Ordinarily, an unsworn declaration made under penalty of perjury may be used to satisfy the requirement that the interrogatories be executed under oath. 28 U.S.C. § 1746.

(4) Answers are signed by the party responding; objections are signed by the attorney making them. But note Fed. R. Civ. P. 26(g) which requires the signature of the attorney of record on the answers as well.

(5) Can be used at trial to extent permitted by the rules of evidence.

(6) Party responding can produce business records or files in lieu of answering if the answers can be found therein and, as between the responder and the inquirer, the burden of finding the answers would be equal. Fed. R. Civ. P. 33(d). See Rainbow Pioneer v. Hawaii-Nevada Investment Corp., 711 F.2d 902 (9th Cir. 1983); Walt Disney Co. v. DeFabiis, 168 F.R.D. 281 (C.D. Cal. 1996).

(7) Answers must be served within 30 days unless the court orders a shorter or longer time for response, or the parties agree to same. Failure to timely object constitutes a waiver of any objection including that the information sought is privileged. See, e.g., United States v. 58.16 Acres of Land, 66 F.R.D. 570, 572 (D. Ill. 1975).

b. Drafting Considerations.

(1) Unlike questions asked at a deposition, the answers to interrogatories will be "word-smithed" by the opposing party's attorney. Careful drafting is important. Any excuse to avoid answering an interrogatory will be offered. Don't expect to get a smoking gun out of an interrogatory answer.

(2) The following areas are appropriate for interrogatories in most cases:

(a) Background information on the plaintiff that will usually take some research to produce, such as the dates of past medical treatment, former residences, names and addresses of employers, etc. These items can be acquired through interrogatories rather than wasting deposition time.

(b) Factual details that are not controversial but are not included in the Complaint or Answer.

(b) The application of law to fact or the party's contentions concerning certain facts ("contention interrogatories"). See B. Braun Medical, Inc. v. Abbott Laboratories, 155 F.R.D. 525 (E.D.Pa. 1994); Nestle Food Corp v. Aetna Cas. & Sur. Co., 135 F.R.D. 101 (D.N.J. 1990); In re One Bancorp. Securities Lit., 134 F.R.D. 4 (D. Me. 1991). But cannot ask for pure conclusions of law. Bynum v. United States, 36 F.R.D. 14, 15 (D.C. La. 1965).

(3) Miscellaneous considerations:

(a) Form interrogatories may be a useful starting place in drafting, but should be used with care.

(b) Definitions sections are frequently used in conjunction with interrogatories. By defining terms interrogatories can be shortened and unnecessary objections concerning ambiguity can be avoided. However, the requirements imposed by these sections are often ignored.

(4) Interrogatories that are objectionable in part, must be answered to the extent not objectionable. Fed. R. Civ. P. 33(b)(1). Thus, the rule codifies the common practice of:

(a) stating an objection to the interrogatory;

(b) re-stating the interrogatory in a non-objectionable way, and;

(c) answering the re-stated interrogatory.

c. Timing.

(1) A first set of interrogatories should be propounded as early as possible in order to secure necessary background information for the litigation.

(2) At a minimum, interrogatories should be propounded before depositions unless unusual circumstances dictate otherwise.

(3) A second set of interrogatories propounded late in the case, (i.e. a number of contention interrogatories) used in conjunction with requests for admission can be used to

narrow the issues to be tried.

2. Request for Production of Documents and Things (Fed. R. Civ. P. 34).

a. General procedure.

(1) Applies only to parties. Hatch v. Reliance Ins. Co. 758 F.2d 409 (9th Cir. 1985), cert. den'd 474 U.S. 1021.

(2) Must set forth with "reasonable particularity" the documents or things to be produced for inspection, copying, or testing. What is an adequate description is a relative matter. You may designate documents by category. "The goal [of designating documents with reasonable particularity] is that the designation be sufficient to apprise a man of ordinary intelligence what documents are required and that the court be able to ascertain whether the requested documents have been produced." Wright & Miller, Federal Practice and Procedure, Civil § 2211 at 631; U.S. v. National Steel Corp., 26 F.R.D. 607 (C.D. Tex. 1960).

(3) The documents or things must be in the possession, custody, or control of the party. Fed. R. Civ. P. 34(a)(1).

(a) "Control" generally means the ability to obtain. Comeau v. Rupp, 810 F.Supp. 1127, 1166 (D.Kan. 1992) recon. den'd 810 F.Supp. 1172.

(b) Party seeking production does not have a right, however, to an authorization permitting independent access to the documents or things. Neal v. Boulder, 142 F.R.D. 325, 328 (D.Colo. 1992) (Opposing party was not entitled to an authorization to secure medical records).

(4) Must also set forth a reasonable time, place and manner for inspecting and copying. Fed. R. Civ. P. 34(b).

(5) A response to a request for inspection must be served within 30 days, unless the court orders a shorter or longer time for it. A response is not production. The response simply agrees to permit inspection or objects. Fed. R. Civ. P. 34(b)(2).

(6) The responding party "shall" produce documents for inspection in the manner they are kept in the ordinary course of business or organize and label them to correspond with the categories of the request. Fed. R. Civ. P. 34(b)(2)(E).

b. Drafting considerations for requests and responses.

(1) "Reasonable particularity" requirement is one that will cause the most problems. If it can be misunderstood, it will be.

(2) In an effort to get all documents, tendency is to draft over-broad requests. May need to wait until answers to interrogatories are in before adequate production requests can be drafted.

(3) Following types of requests may be appropriate in most cases:

(a) Assuming an appropriate interrogatory was asked, the documents identified in the answer to the interrogatory.

(a) All documents referred to or consulted in preparing answers to interrogatories.

(4) Like interrogatories, the request for production must be tailored to the case at hand.

(5) Electronic information. Fed. R. Civ. P. 34 applies to information stored on any electronic media. Don't overlook the possibility that material subject to production may exist on thumb drives, hard disks, CD-ROM and may include draft versions of documents, E-Mail messages, databases and other information customarily stored on electronic media. See Zubulake v. UBS Warburg LLC, 02 Civ. 1243, U.S.D.C. (S.D.N.Y.) (Orders of May 13, 2003 and June 24, 2003).

c. Timing.

(1) The request for production should be served as early as possible in the litigation.

(2) Additional requests may be required as further discovery reveals the existence of documents that may not have been described in the initial request. The federal rules make no limitation on the number of requests which may be propounded and local rules seldom do.

(3) In the rare case where local rules limit the number of requests, a single interrogatory that requests the adversary to describe the documents, records and things which exist can be propounded prior to issuing the document request.

d. Securing documents from non-parties.

(1) Fed. R. Civ. P. 34 applies only to parties, therefore, must subpoena documents or things from non-parties.

(2) Can serve subpoena for the individual to appear at a deposition and produce described documents, or subpoena only the documents. Fed. R. Civ. P. 45. Any objection must be raised in court that issued subpoena, not forum court. In re Digital Equipment Corp, 949 F.2d 228 (8th Cir. 1991).

(3) If the discovery sought involves entering upon a non-party's land, such may now be had under amended Fed. R. Civ. P. 45.

3. Physical and Mental Examinations (Fed. R. Civ. P. 35).

a. General procedure.

(1) Absent agreement, an independent medical examination (IME) requires a court order.

(2) An IME is allowed of a party or a person under the custody or control of a party by a "suitably licensed or certified examiner." Fed. R. Civ. P. 35(a)

(3) An IME will be permitted only upon a showing of "good cause."

(a) The mental or physical condition of the person to be examined must be in controversy. A plaintiff in a personal injury case places his mental or physical condition in controversy and thus provides the defendant with good cause. Schlagenhauf v. Holder, 379 U.S. 104 (1964). See also Stanislawski v. Upper River Services, Inc., 134 F.R.D. 260 (D. Minn. 1991) (vocational examinations excluded).

(b) The mental condition of a party is not in issue simply because the intent of a party is in issue. Taylor v. National Group of Companies, Inc., 145 F.R.D. 79, 80 (N.D.Ohio 1992); but see Eckman v. University of Rhode Island, 160 F.R.D. 431 (D.R.I. 1995).

(4) Order must specify the time, place, manner, conditions, and scope of the examination, and the person or persons who will conduct the IME. Thus, all arrangements should be made prior to filing the motion. Fed. R. Civ. P. 35(a)(2).

(5) Person examined is entitled to a copy of the examiner's report upon request. If request is made, examined party must provide opponent with copies of reports of previous or subsequent examinations. By requesting and obtaining copy of examiner's report or by taking examiner's deposition, person examined waives any doctor-patient privilege that may apply to another person who has examined him or who may examine him in the future with respect to the mental or physical condition in issue. Fed. R. Civ. P. 35(b).

b. Practical Considerations.

(1) Fed. R. Civ. P. 35 exam can be arranged by stipulation or agreement of the parties. Same general rules concerning exchange of reports, etc., apply to examinations by stipulation unless agreement provides otherwise.

(2) An IME conducted too early in the course of the patient's illness or recovery period may not be valid at the time of trial. For example, an early IME may not provide the patient with enough time to fully improve, and thus, be of little help in minimizing damages. On the other hand, an IME too late may blow any chance of settlement for a reasonable amount or put you in a bind to locate an additional expert to address some condition the examination revealed. Thus, the timing of the IME is important, but it must depend upon the unique circumstances of each case.

(3) A thorough exam by a competent physician may reveal that the adverse party patient is severely disabled and has very little chance of recovery. Thus, you may be helping your opponent's case by seeking the IME. Don't seek an IME until you have obtained all of the plaintiff's medical records and have had them reviewed by appropriate consultants. You may find that an exam is not really needed.

(4) While the rule allows mental as well as physical exams, approach the mental IME with care. Experience shows that a psychiatric/psychological examination seldom results in a diagnosis of no abnormality.

4. Requests for Admissions (Fed. R. Civ. P. 36).

a. Purpose of the rule is to eliminate issues that are not really in dispute and to facilitate the proof of those issues that cannot be eliminated.

b. Request may go to any matter within the scope of discovery. Thus, not strictly limited to seeking admissions of "facts." Furthermore, it is not grounds for objection if the request goes to central facts upon which the case will turn at trial. See, e.g., Pleasant Hill Bank v. United States, 60 F.R.D. 1 (W.D. Mo. 1973). Prior to the 1970 amendments to the Federal Rules, some courts would restrict the use of Fed. R. Civ. P. 36 and not permit requests that went to "ultimate facts," "mixed law and fact," and "opinion." The 1970 changes provide for Fed. R. Civ. P. 36(b) to govern the scope of the request.

c. General Procedure.

(1) Each request must be separately set forth.

(2) Responding party has 30 days within which to answer, unless the court orders a shorter or longer time.

(3) Unless answers are served within the time permitted, the requests will be deemed admitted. Fed. R. Civ. P. 36(a); United States v. Kasuboski, 834 F.2d 1345 (7th Cir. 1987); Dukes v. South Carolina Ins. Co., 770 F.2d 545 (5th Cir. 1985); E.E.O.C. v. Jordon Graphics, Inc., 135 F.R.D. 126 (W.D.N.C. 1991).

(4) Answers must fairly meet the substance of the request. Cannot evade a response due to lack of "information or knowledge" unless you make a reasonable inquiry in an attempt to gain the information upon which either an admission or a denial can be based. Fed. R. Civ. P. 36(a); United States v. Kenealy, 646 F.2d 699 (1st Cir. 1981), cert. den'd, 454 U.S. 941 (1981). Johnson Intern. Co. v. Jackson Nat. Life Ins. Co., 812 F.Supp. 966 (D. Neb. 1993), aff'd and remanded 19 F.3d 431.

(5) Court has discretion to permit party to withdraw a prior admission or to relieve a party from the effect of an admission for failure to respond. Fed. R. Civ. P. 36(b). Whether the court will exercise that discretion and give the party relief will depend upon the prejudice to the other party and whether the party seeking relief has acted in good faith. Donovan v. Buffalo Downtown Dump Truck Service & Supplies, Inc., 1 Fed. Rules Serv. 3d (Callaghan) 561 (W.D.N.Y. 1985); Baleking Systems, Inc., 40 Fed. Rules Serv. 2d (Callaghan) 1177 (D. Ore. 1984); Gardella v. United States, 23 Fed. Rules Serv. 2d (Callaghan) 867 (D. Mass. 1977).

(6) If a party fails to admit in response to a request and the requesting party subsequently proves the truth of the matter embodied in the request, the party refusing to admit may be required to pay the requesting party's expenses incurred in proving the matter, including reasonable attorney's fees. Fed. R. Civ. P. 37(c).

d. Practical Considerations.

(1) Careful drafting is required. Limit the scope of each request. The narrower the better. "Admit that plaintiff's injuries were proximately caused by his own contributory negligence" v. "Admit that plaintiff consumed four beers between 6:00 p.m. and 8:30 p.m."

(2) Use of request for admissions early in the case will limit the issues and probably save considerable discovery. But, if local rules limit the number of requests it is usually better to wait until after some discovery has been conducted in order to make the best use of the requests.

(3) Requests for admission are particularly well suited for easing introduction of documentary evidence.

(4) Consider using requests for admissions and interrogatories in conjunction. E.g.:

"Admit that plaintiff's tumor was not a prolactin secreting tumor."

"If your response to the foregoing Request for Admission was anything other than an unqualified admission, please set forth with specificity all the evidence and information, including testimony and records of every kind, that you contend supports your response."

(5) United States Attorneys cannot admit liability in cases seeking damages in excess of their settlement authority. Thus, when the request for admission asks the U.S. to admit negligence or liability, the U.S. Attorney may not be permitted to admit, even if an admission is appropriate, without the approval of DOJ. Most cases can be handled with a denial since the request will be so broad and will cover so many issues that an unqualified admission will not be required. Furthermore, if the admission comes early in the case an inability to either admit or deny due to the incomplete nature of the investigation may be appropriate. Difficulties arise, however, where the opponent submits well drafted admissions directed to each of the underlying facts comprising the plaintiff's case. These cannot be avoided and counsel should notify DOJ ASAP.

D. Appellate Review of Discovery Orders

1. Most discovery orders are interlocutory and not immediately appealable. After judgment when they may be appealed, it is often difficult to show prejudice or how the issue is not now moot.

2. Varying ways to seek immediate review are on contempt citations, by writ of mandamus, on appeal from the quashing of a subpoena, or on interlocutory appeal under 28 U.S.C. § 1292(b).

3. The standard of appellate review is highly deferential (abuse of discretion). See Boardman v. National Medical Enterprises, 106 F.3d 840 (8th Cir. 1997); In re San Juan DuPont Plaza Hotel Fire Litigation, 859 F.2d 1007 (1st Cir. 1988).

FEDERAL LITIGATION COURSE

TAB E

DISCOVERY/ DEPOSITIONS

I. DEPOSITIONS – RULES AND PROCEDURES

A. Depositions Upon Written Questions (Fed. R. Civ. P. 31).

1. "Interrogatories" to non-parties.

2. Subpoena issued under Fed. R. Civ. P. 45 can compel the witness to attend.

3. No more than 10 depositions under this rule and under Rule 30 may be taken by all the plaintiffs, all the defendants, or all the third-party defendants without leave of court. Further, no witness may be deposed more than once.

4. General Procedure.

(a) Party noticing the deposition must serve notice and his questions upon all other parties.

(b) Parties then have 14 days to serve cross-examination questions. Within 7 days of service of cross-examination questions, party noticing deposition may serve re-direct questions. Opponent then has 7 days to serve re-cross.

(c) After all questions have been served and re-served, party noticing the deposition delivers them to the court reporter and issues subpoena for the witness. Court reporter reads the questions to the witness and records the answers.

5. Practical Considerations.

(a) Much cheaper to mail a set of questions to a court reporter than to fly to some distant location to depose the witness in person.

(b) Useful for establishing evidentiary foundations to authenticate documents or to lay foundations for business records, etc.

(c) If the witness knows anything about the "facts" of the case, the deposition upon written questions is a very cumbersome and unreliable way to get that person's testimony.

(d) Will probably become even more underutilized as video-conferencing for depositions becomes cheaper and more accessible.

B. Depositions Upon Oral Examination (Fed. R. Civ. P. 30).

1. General Procedures.

(a) Must give "reasonable notice" in writing to all other parties. Must include time, date, place, and name and address of witness to be examined, as well as the manner in which the deposition will be recorded. If the name of the proposed deponent is unknown, the notice must provide "a general description sufficient to identify the person or the particular class or group to which the person belongs."

(b) What is "reasonable" will depend upon the circumstances. Compare Lloyd v. Cessna Aircraft, 430 F. Supp. 25 (E.D. Tenn. 1976) (Two days not reasonable), with FAA v. Landry, 705 F.2d 624 (2d Cir. 1983) (Four days reasonable). But see National Independent Theatre Exhibitors, Inc. v. Buena Vista Distribution Co., 748 F.2d 602 (11th Cir. 1984) (Four days not reasonable).

(c) Notice served less than 14 days prior to the deposition is risky. Under Rule 32, if a party "promptly" files a motion for protective order that the deposition be taken at another time or place or not be taken, and the motion is pending when the deposition is taken, the deposition may not be used against the party. Fed. R. Civ. P. 32(a)(5)(A).

(d) Witness attendance may be compelled through the use of a subpoena. Fed. R. Civ. P. 45. Notice is sufficient to compel the attendance of a party. Pinkham v. Paul, 91 F.R.D. 613 (D. Me. 1981). If the subpoena also compels production of documents, the documents to be produced must be identified in the deposition notice or an attachment to it. Fed. R. Civ. P. 30 (a)(1) and 30 (b)(2).

(e) General rule is that the plaintiff must appear for his deposition in the forum. Martin Engineering Co. v. Vibrators, Inc., 20 Fed. R. Serv. 2d (Callaghan) 486 (E.D. Ark. 1975). But, the place of the deposition is within the sole discretion of the court and it may alter the location as it deems appropriate. Young v. Clearing, 30 Fed. R. Serv. 2d (Callaghan) 789 (E.D. Pa. 1980). Court will consider convenience, expense, etc.

(f) Under Fed. R. Civ. P. 30(b)(6), a party may take the deposition of a corporation, association, or governmental agency by noticing the organization and specifying the scope of the matters it wishes to inquire into. The organization must then designate the witness who will testify. Any admissions made by the designated witness are admissible against the organization. Sanders v. Circle K. Corp. 137 F.R.D. 292 (D. Az. 1991); Moore v. Pyrotech Corp., 137 F.R.D. 356 (D. Kan. 1991). See King v. Pratt & Whitney, 161 F.R.D. 475 (S.D. Fla. 1995) for a discussion of the proper procedure and scope of questioning at a deposition noticed pursuant to Rule 30(b)(6).

(g) No more than 10 depositions under this rule and under Rule 30 may be taken by all the plaintiffs, all the defendants, or all the third-party defendants without leave of court. Further, no witness may be deposed more than once.

(h) A deposition "may be recorded by audio, audiovisual, or stenographic means" unless the court orders otherwise. Fed. R. Civ. P. 30 (b)(3).

(1) The party taking the deposition must state in the notice the method by which the testimony will be recorded.

(2) With prior notice to the deponent and the other parties, a party may designate and arrange for another method of recording the testimony, at that party's expense.

(3) Any party may arrange for a transcript to be made from a deposition recorded by other than stenographic means.

(4) If a nonstenographically recorded deposition is used at trial, those portions used must be transcribed. "On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise. Fed. R. Civ. P. 32(c).

(i) Fed. R. Civ. P. 30(b)(4) provides deposition can be taken by telephone or other remote electronic means (e.g. satellite television) upon stipulation of parties or court order. This is a cost effective means to secure evidence, but obvious limitations to implementation exist. See Baker v. Institute for Scientific Information, 134 F.R.D. 117 (E.D. Pa. 1991). The deposition is taken where the witness answers the questions.

(j) If, prior to the conclusion of the deposition, the deponent or any party requests to review the deposition before it is filed, the deponent will be given 30 days after the transcript or recording is available to review and correct it. Fed. R. Civ. P. 30 (e). Purpose of review is to correct substantive or transcription errors of the court reporter, not to permit broad amendment of testimony. Greenway v. International Paper Co., 144 F.R.D. 322, 325 (W.D. La. 1992) (Sixty-four corrections in 200 page deposition, many of them substantive, not permitted.)

(k) As a general rule, "counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer." Armstrong v. Hussman Corp., 163 F.R.D. 299, 303 (E.D. Mo. 1995).

(l) Depositions are presumptively limited to one day of seven hours. However, the court "must allow additional time . . . if needed for a fair examination of the deponent or if the

deponent or another person, or other circumstance, impedes or delays the examination." Fed. R. Civ. P. 30(d)(1)

II. TAKING AND DEFENDING ORAL DEPOSITIONS – PRACTICE TIPS

A. Defending Depositions.

1. Witness preparation. Every witness should be prepared prior to the deposition, but the nature and degree of pre-deposition preparation depends on the type of witness and his prior testimonial experience.

2. Your preparation should be designed to make all witnesses informed about and comfortable with the deposition process and capable of reciting the relevant information they possess in a fashion most favorable to your position in the litigation. It should include:

(a) A review of the relevant evidence likely to be elicited during questioning. Let the witness tell the story first, then go back over parts and explore extent of witness' knowledge, recollection, etc.

(b) A review of all documents which the witness is likely to see during the deposition.

(1) In some cases there may be documents which exist, but you decide the witness should not review prior to testifying. (e.g. a statement by another witness substantially similar to the deponent when the opposing counsel is likely to raise a claim that they collaborated on their testimony. The witness should be told of the existence of the document and what its general nature is so that he will be confident in declaring that he has not previously seen it when it is shown to him.

(2) Caveat: use of privileged documents to prepare a witness for deposition testimony may result in the waiver of the privilege. Sprock v. Peil, 759 F.2d 312 (3d Cir. 1985); S & A Painting Co. Inc., v. O.W.B. Corp., 103 F.R.D. 407 (W.D. Pa. 1984). See the Note of Advisory Committee on Rules, 1993 Amendment to Rule 26(a)(2)(B) ("[L]itigants should no longer be able to argue that materials furnished to their experts to be used in forming their

opinions - whether or not ultimately relied upon by the expert - are privileged . . . .")

(3) Ensure that deponent has reviewed all his prior statements before being deposed. See Sims v. Lafayette Parish School Bd., 140 F.R.D. 338 (W.D. La. 1992).

(c) Instruction about the three primary purposes of a deposition:

(1) To fix the witness' testimony so that it may be altered at trial only at the expense of the witness' credibility;

(2) To find out what the witness knows;

(3) To assess how credible the witness' testimony will be at trial.

(d) A reminder that the witness will be testifying under oath and that he is required to tell the truth. If opposing counsel asks what the witness was told in preparation, the one instruction that should always be recited is that he was told to tell the truth.

(e) A warning against volunteering information--Being truthful doesn't require the witness to volunteer information that hasn't been elicited by questioning.

(f) A reminder to listen carefully to questions and to ask for the question to be repeated or for clarification if he doesn't understand the question.

(g) A suggestion that questions which can't be answered with "yes" or "no" even though they are phrased to elicit one of those responses, can and should be qualified with additional information. The opposing counsel is not "entitled to a yes or no answer" to any question.

(h) A reassurance that "I don't know" and "I don't remember" are perfectly acceptable responses if they are truthful. However, the questioner may ask for estimates and "best guesses" and there is no rule against these, so long as the record is clear that the response is an estimate.

(i) A reassurance that the preparation session you are conducting is perfectly appropriate and that it is acceptable to relate any of it that the witness can recall if he is questioned about it. Tell your witness, "If you remember nothing else about this session, please recall that I told you to tell the truth."

(j) A warning that the deposition process and the opposing counsel should be taken very seriously. The questioner is not there to help the witness, nor to do him any favors. Treat opposing counsel with courtesy, but there's no reason to be overly "friendly." Don't joke around. A cute remark may not seem so funny when read in court. Don't converse with anyone, the court reporter, opposing counsel, or other attendees about the subject matter of the litigation or related aspects. There is no such thing as a remark "off the record."

(k) A suggestion that the witness should pause and think before answering. This will give you time to object and the witness time to formulate a coherent response.

(l) An instruction that the witness should ask for a break when he needs one. The deposition is not an endurance contest. Confirm that the deposition will probably take some time and that the witness should not assume that it's nearly over simply because he believes he has told his entire story.

(m) A warning that the witness should not agree to do anything for counsel after the deposition. The witness has no obligation to do additional work or research, to improve his memory, or to fill in forgotten details.

(n) An instruction that, if you object, he should stop talking and listen to the objection. Tell the witness that the objection is made only to preserve it for later, but that frequently, listening to the objection will point out deficiencies in the question that may not otherwise be apparent.

3. Preparing expert witnesses. Preparing an expert witness for his deposition poses special problems.

(a) Don't assume that the expert knows or recalls all of the "general witness" instructions. It's the witnesses who have been deposed most frequently who violate them most often.

(b) Ensure that your witness understands your theory of the case and how his testimony fits into it. Prepare him to resist the temptation to offer "off the cuff" opinions on matters you have not asked him to review.

(c) Help the witness anticipate where his opinion will be assaulted and prepare a credible response to good criticisms of his view. Don't deprive your expert of your knowledge about where your adversary's emphasis will be placed.

4. Intra-deposition Issues

(a) Suspending the deposition to seek relief from the court. Fed. R. Civ. P. 30(d)(3) provides that either party or a deponent can suspend the taking of the deposition for the time necessary to petition the court for a protective order when the deposition is being conducted in such a manner so as to annoy, embarrass, or oppress the deponent or party. See Smith v. Loganport Comm. School Corp., 139 F.R.D. 637 (N.D. Ind. 1991).

(b) Objectionable questions.

(1) Fed. R. Civ. P. 32(d)(3)(A) and (B) note:

(A) "An objection to a deponent's competence – or to the competence, relevance or materiality of testimony – is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time."

(B) "An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(ii) it is not timely made during the deposition."

(iii)

(2) Improper questions include: ambiguous or unintelligible, compound, argumentative, leading (on direct), one that calls for a narrative answer, and one that misquotes the witness' testimony.

(3) Counsel should raise only those objections that will be waived if not made at the deposition. Fed. R. Civ. P. 30, Committee Notes.

(4) Any objections are to be stated "concisely in a nonargumentative and nonsuggestive manner." Fed. R. Civ. P. 30(c)(2). See Danaj v. Farmers (N.D. Okla. 1995)(defense counsel required to cease "speaking objections" and other "obstructionist tactics" at oral deposition).

(5) The objections made will be entered upon the deposition, however, the testimony is taken subject to the objections. Fed. R. Civ. P. 30(c)(2). "A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion [to suspend the taking of the deposition because it is being conducted in bad faith, or in a manner to annoy, embarrass, or oppress the deponent or the party]." Fed. R. Civ. P. 30(c)(2). Thus, unless the question seeks privileged information, the witness must answer subject to the objection. See, e.g., Ralston Purina Co. v. McFarland, 550 F.2d 967 (4th Cir. 1977); International Union of Elec. Radio and Mach. Workers v. Westinghouse Elec. Corp., 91 F.R.D. 277 (D.D.C. 1981); Coates v Johnson & Johnson, 85 F.R.D. 731 (N.D. Ill. 1980); Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455 (N.D. Cal. 1978); Lloyd v. Cessna Aircraft Co., 74 F.R.D. 518 (E.D. Tenn. 1977).

(c) "Private conferences between deponents and their attorneys during the taking of a deposition are generally considered improper." Langer v. Presbyterian Medical Center of Pennsylvania, 1995 WL 79520 at 11 (E.D. Pa. Feb. 17, 1995), vacated on other grounds 1995 WL 395937 (E.D. Pa. July 3, 1995). The only exception is a conference to determine whether a privilege should be asserted. Id. See also Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993).

(d) At the conclusion of opposing counsel's questions, weigh very carefully whether you will question the witness. If you question, you provide your opponent with an additional opportunity for questioning.

5. Logistical considerations. The recording requirements for depositions, Fed. R. Civ. P. 30(b)(3), make it mandatory that counsel defending a deposition consider the logistical arrangements for transcription made by others. Remember:

(a) A deposition notice which does not set forth the method of recording is defective;

(b) Any notary public with a cassette recorder is qualified to record a deposition;

(c) If the method of recording by which counsel intends to take a deposition is likely to capture the testimony inaccurately, it may be necessary to arrange for some other means of recording it.

B. Taking Depositions.

1. Objectives.

(a) To discover admissible evidence and develop information that will lead to evidence.

(b) To obtain admissions and create weaknesses in opponent's case.

(c) To learn what witness knows about the case and to fix his testimony.

(d) To discover strengths and weaknesses of opponent's case.

(e) To develop material for cross-examination.

(f) To evaluate the witness and opposing counsel.

(g) To perpetuate testimony.

(h) To display your capabilities and strengths of your case.

(i) To authenticate and lay the foundation for admission of documents into evidence.

(j) To lay the foundation for motions to compel and dispositive motions.

(k) To improve your posture in settlement negotiations.

2. Preparation.

(a) Same preparation as you would for trial testimony.

(b) Review all previous discovery, organize documents to be used at deposition, and prepare outline of questioning.

(c) A form outline for expert testimony is a good beginning, but must be adapted for the particular facts of your litigation.

3. Logistics.

(a) Retain court reporter. Usually hire reporter in the town where the witness lives rather than taking one with you.

(i) Make telephonic contact with reporter to confirm date/time of deposition.

(ii) If deposition deals with technical or scientific subjects, ask for reporter with experience in those areas.

(iii) Court reporters often have offices or conference facilities suitable for taking depositions and will make those facilities available for the deposition.

(iv) Check to make sure the reporter will provide the kinds of services necessary (i.e. condensed or electronic transcripts, .pdf files for exhibits?)

(b) Arrange for the place to conduct the deposition if it is not at the witness' or court reporter's office.

(c) Send out notice to all parties, and court reporter. Arrange for subpoena if non-party is to be deposed.

(a) Double check with court reporter a day or two ahead of time.

(b) Make the court reporter aware of anything out of the ordinary that is likely to disrupt the proceeding or make the court reporter uncomfortable.

4. Relationship with the deponent.

(a) Make a conscious choice about the style you will display during the deposition. Consider the nature of the witness (e.g. lay or expert; fact or specially retained), the relationship of the witness to the litigation, how the witness is likely to view you, and how your performance may effect the witness' view of you in the trial.

(b) Can change tone and/or style during course of deposition, but if you must "get tough" with the witness, do it after you have gotten all of the concessions you can by being "nice."

(d) Establish early in the deposition that you have command of the facts of the case and that you have prepared for this deposition. This is particularly true for expert witnesses who may be tempted to inflate their credentials or the strength of their opinions unless you convince them that it is dangerous to do so.

5. Relationship with counsel.

(a) Establish control. Arrive early and set the room up as you want it (with deference to the needs and requests of your court reporter).

(b) NEVER let opposing counsel know that your time is limited (e.g. that you need to catch a particular flight home).

(c) Your attitude toward opposing counsel when first entering the room can be very significant to the deponent's perception of you. E.g., if you are courteous and friendly and engage in some "light-hearted" banter, the witness may think that you are not as big an ogre as his lawyer told him you were.

6. Interrogating the witness.

(a) Opening explanation and agreement.

(i) Have court reporter swear witness and, if relevant, attach a copy of notice to record. Unless waived, start with the 30(b)(5)(A) litany.

(ii) Introduce yourself on the record and cover following points:

a) Who you represent and purpose of deposition.

b) You will ask questions and witness will answer under oath and court reporter will record the exchange verbatim.

c) Not trying to trick witness, just want to know what information he has that is relevant and material to the case.

d) Ask witness to agree to ask for clarification of any question that he/she does not understand. If question is answered you must assume that witness understood question.

e) If need break just say so.

f) Any reason why can't take the deposition at this time.

g) Any plans to move or change positions in future.

(b) Inquire about the witness' preparation.

1. What documents were reviewed?

2. Who did witness talk to about case?

3. What was substance of any conversation with anyone (including counsel) about case/testimony?

(c) Inquire about documents produced.

1. If documents were to be produced go over each one individually and have deponent identify.

2. If documents were not produced that were requested ask questions to determine who may have custody/control and why they weren't produced.

(d) Miscellaneous

1. Frequently use catch-all questions.

"Have you told me everything you can remember?"
“Is there anything that would refresh you memory?"
"What else do you recall?"
"Is that all you can remember?"

4. Use pregnant pauses to allow the witness to volunteer information.

5. Clarify special terms.

   "When I refer to 'peer-reviewed journals' what do you understand that to mean, if anything?"

6. Mark all documents that the witness reviews and refer to the documents by exhibit number.

(e) Deal with evasive witnesses.

1. Object to non-responsive answers.

2. Break questions down.

3. Persist.

4. Alert the witness to the proposition that you will not conclude the deposition without responsive answers. ("Shall we break for supper or keep going?")

(f) Inquire about the witness' knowledge of other discoverable information.

(g) Respond appropriately to objections.

1. Listen/learn. Re-phrase if you should.

2. Get an answer nonetheless. "You may answer the question."

3. Alert opposing counsel that you know the rules. "Are you instructing the witness not to answer?"

4. Make a complete record. "Are you refusing to answer and, if so, are you doing so on advice of counsel?"

(h) Listen to the answer (you may learn something).

(i) Take notes. Review and ask follow-up questions before concluding your examination.

FEDERAL LITIGATION COURSE

TAB F

TEMPORARY RESTRAINING ORDERS & PRELIMINARY INJUNCTIONS

"Plaintiffs may attempt to force Government action or restraint in important operational matters or pending personnel actions through motions for temporary restraining orders (TRO) or preliminary injunctions (PI). Because these actions can quickly impede military functions, immediate and decisive action must be taken." AR-27-40, para. 3-5.

I. INTRODUCTION.

A. Types of Injunctive Relief.

1. Temporary Restraining Order [TRO].

2. Preliminary Injunction [PI].

3. Permanent Injunction.

II. TEMPORARY RESTRAINING ORDERS.

A. General.

1. Purpose: prevent irreparable injury to moving party until court can hear motion for preliminary injunction.

2. Governing rules Fed. R. Civ. P. 65(b); RCFC 65(b).

B. Procedure.

1. Notice.

a. General rule: notice is required before entry of a TRO. *E.g.*, Thompson v. Ramirez, 597 F. Supp. 726 (D.P.R. 1984).

--Notice to successful bidder. RCFC 65(f)(2).

b. Exception:

(1) Movant will suffer irreparable injury if adverse party afforded opportunity to be heard; and

(2) Movant's attorney certifies efforts made to give notice and the reasons why notice should not be required. Fed. R. Civ. P. 65(b); RCFC 65(b). First Technology Safety Systems v. Depinet, 11 F.3d 641 (6th Cir. 1993); Thompson v. Ramirez, 597 F. Supp 726 (D. P.R. 1984).

2. Term of the order: 10 days, with possible 10 day extension. Fed. R. Civ. P. 65(b); RCFC 65(b).

3. Security. Fed. R. Civ. P. 65(c); RCFC 65(c). Rule 65(c) requires applicants for restraining orders or preliminary injunctions to give as security a sum deemed proper by the court for payment of such costs and damages as may result to any party who is found to have been wrongfully restrained or enjoined. Fireman's Fund Ins. Co. v. S.E.K. Constr. Co., 436 F.2d 1345 (10th Cir. 1971). A bond is not required when the US is the petitioner. Squaxin Island Tribe v. State of Washington, 781 F.2d 715, 723 (9th Cir. 1986).

4. Moving for hearing for preliminary injunction -- takes precedence over other matters. Fed. R. Civ. P. 65(b); RCFC 65(b).

5. Burden of proof.

a. General. Burden of proof is on the moving party. Crowther v. Seaborg, 415 F.2d 437 (10th Cir. 1969); Colorado Environmental Coalition v. Bureau of Land Management, 932 F.Supp. 1247, 1251 (D. Colo. 1996) (citing Seaborg).

b. Elements. The standard four prong test for injunctive relief (Trucke v. Erlemeier, 657 F. Supp. 1382, 1389 (N.D. Iowa 1987) (citing Younger v. Harris, 401 U.S. 37 (1970)); Minneapolis Urban League v. City of Minneapolis, 650 F. Supp. 303 (D. Minn. 1986)):

(1) Substantial likelihood of success on the merits.

(2) Irreparable injury to movant if relief is denied.

(3) Relative harm to the opposing party (balance of harms).

(4) Impact on the public interest.

6. Appeal.

a. General rule: orders granting, denying, modifying, or dissolving TROs are not appealable. *E.g.*, Geneva Assurance Syndicate, Inc. v. Medical Emergency Services Associates, 964 F.2d 599 (7th Cir. 1992); Fernandez-Roque v. Smith, 671 F.2d 426 (11th Cir. 1982).

b. Exceptions:

(1) Extension of TRO substantially beyond time limits of Rule 65(b). In effect, an extension beyond 20 days converts the TRO to a preliminary injunction, which is appealable under 28 U.S.C. 1292(a)(1). Sampson v. Murray, 415 U.S. 61 (1974); United States v. Board of Education of City of Chicago, 11 F.3d 668 (7th Cir. 1993).

(2) Denial of the TRO would result in irreparable harm to national security or other important government interest under circumstances in which monetary damages would be inadequate . United States v. Washington Post Co., 446 F.2d 1322 (D.C. Cir. 1971) (Note that the appellate court in this case does not address the question of its power to review the denial of the TRO as an interlocutory matter so it is not clear that either party ever raised this issue; instead, the appellate court merely reviews the district court's substantive decision to deny the TRO and then reverses that decision on national security grounds, grants the TRO, and remands for a hearing on a preliminary injunction.).

(3) TRO denied following notice and hearing under circumstances in which such denial was tantamount to the denial of a preliminary injunction. Religious Technology Center v. Scott, 869 F.2d 1306, 1308 (9th Cir. 1989).

III. PRELIMINARY INJUNCTIONS.

A. General.

1. Purpose: prevent irreparable injury during pendency of lawsuit.

2. "A Preliminary Injunction is an extraordinary remedy never awarded as of right." Munaf v. Geren, 128 S.Ct. 2207, 2218-2219 (2008).

2. Governing rules: Fed. R. Civ. P. 65(a); RCFC 65(a).

B. Procedure.

1. Notice and hearing. Fed. R. Civ. P. 65(a)(1); RCFC 65(a)(1). United States v. Board of Education of City of Chicago, 11 F.3d 668 (7th Cir. 1993).

a. Type of hearing. *See, e.g.*, Drywall Tapers and Pointers of Greater New York v. Local 530 of Plasterers and Cement Masons International Association, 954 F.2d 69 (2d Cir. 1992); International Molders' & Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 555 (9th Cir. 1986).

b. Consolidation of trial on the merits. Fed. R. Civ. P. 65(a)(2); Abraham Zion Corp. v. Lebow, 761 F.2d 93, 100-1 (2d Cir. 1985). *Cf*. Berry v. Bean, 796 F.2d 713, 719 (4th Cir. 1986) (consolidation of merits on appeal).

2. Security. Fed. R. Civ. P. 65(c); RCFC 65(c).

3. Appeal.

a. Orders granting, denying, modifying, or dissolving preliminary injunctions are appealable. 28 U.S.C. § 1292(a)(1).

b. Standard of appellate review: abuse of discretion. *See*, *e.g.*, McKeesport Hospital v. Accreditation Council for Graduate Medical Education, 24 F.3d 519 (3d Cir. 1994); King v. Innovation Books, 976 F.2d 824, 828 (2d Cir. 1992); Abbott Labs v. Mead Johnson Co., 971 F.2d 6, 12 (7th Cir. 1992); Hale v. Department of Energy, 806 F.2d 910, 914 (9th Cir. 1986).

c. Appellate forum. 28 U.S.C. §§ 1292(c); 1295(a)(2).

C. Burden of Proof

1. Burden is on the moving party. Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers, 415 U.S. 423 (1974).

2, "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Resources Defense Council, Inc., 129 S.Ct. 365, 374 (2008).

3. Elements. *See generally* Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991), *rev'g*, 747 F. Supp. 1160 (E.D.N.C. 1990); Cunningham v. Adams, 808 F.2d 815 (11th Cir. 1987); Zardui-Quintana v. Richard, 768 F.2d 1213, 1216 (11th Cir. 1985).

   a. Substantial likelihood of success on the merits. Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991), *rev'g*, 747 F. Supp. 1160 (E.D.N.C. 1990); Berry v. Bean, 796 F.2d 713 (4th Cir. 1986); Tremblay v. Marsh, 750 F.2d 3 (1st Cir. 1985), *rev'g*, 584 F. Supp. 224 (D. Mass. 1984).

   b. Irreparable injury to the movant is likely if relief is denied.

      (1) "Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." Winter v. Natural Resources Defense Council, Inc., 129 S.Ct. 365, 375 (2008).

      (2) Irreparable harm satisfied by plaintiff demonstrating a "significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages." RODA Drilling Co. v. Siegal, 552 f.3d 1203, 1210 (10th Cir. 2009), citing Greater Yellowstone Coal v. Flowers, 321 F.3d 1250, 1258 (10th Cir. 2003).

      (3) Discharge from government employment. Sampson v. Murray, 415 U.S. 61 (1974); Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991), *rev'g*, 747 F. Supp. 1160 (E.D.N.C. 1990). *Cf.* Martin v. Stone, 759 F. Supp. 19 (D.D.C. 1991). *But cf.* Tully v. Orr, 608 F. Supp. 1222 (E.D.N.Y. 1985).

      (4) Involuntary military service. Patton v. Dole, 806 F.2d 24 (2d Cir. 1986).

      (5) Preserving a damages remedy. *See, e.g.*, Airlines Reporting Corp. v. Barry, 825 F.2d 1220 (8th Cir. 1987); Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc., 805 F.2d 351, 355-56 (10th Cir. 1986); Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 52-53 (1st Cir. 1986).

      (6) Alleged constitutional deprivations. Elrod v. Burns, 427 U.S. 347 (1976) (plurality opinion); Covino v. Patrissi, 967

F.2d 731 (2d Cir. 1992); Mariani Giron v. Acevedo Ruiz, 834 F.2d 238 (1st Cir. 1987).

(7) Loss of government contract; loss of ability to compete for contract. *E.g.*, M. Steinthal & Co. v. Seamans, 455 F.2d 1289 (D.C. Cir. 1971).

(a) Plaintiff can recover bid preparation costs. Morgan Business Assoc. v. United States, 619 F.2d 892 (Ct. Cl. 1980). *Compare* Ainslie Corp. v. Middendorf, 381 F. Supp. 305 (D. Mass. 1974), *with* Cincinnati Electronics Corp. v. Kleppe, 509 F.2d 1080 (6th Cir. 1975).

(b) Plaintiff cannot recover anticipated profits. Keco Indus., Inc. v. United States, 428 F.2d 1233 (Ct. Cl. 1970). *See* DLM & A, Inc. v. United States, 6 Cl. Ct. 329 (1984).

(c) Court generally will not order the award of a contract to a successful plaintiff. Delta Data Sys. Corp. v. Webster, 744 F.2d 197 (D.C. Cir. 1984); Golden Eagle Refining Co. v. United States, 4 Cl. Ct. 613 (1984). *But cf.* Ulstein Maritime, Ltd. v. United States, 833 F.2d 1052 (1st Cir. 1987).

c. Relative harm to the opposing party.

(1) a/k/a "Balancing the equities."

(2) "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" Amoco Production Co. v. Gambell, 480 U.S. 531, 542 (1987).

(3) Discharge from government service. Pauls v. Secretary of the Air Force, 457 F.2d 294 (1st Cir. 1972).

(4) Bid protests. Design Pak, Inc. v. Secretary of the Treasury, 801 F.2d 525 (1st Cir. 1985); M. Steinthal & Co. v. Seamans, 455 F.2d 1289 (D.C. Cir. 1971).

(a) Expiration of bids. *See* Sterlingwear of Boston, Inc. v. United States, 11 Cl. Ct. 517 (1987).

(b) End of fiscal year.

(c) Impairment of government program.

(d) Interest in smooth, uninterrupted procurement process.

(e) Injury to third parties (successful bidder).

(f) Loss of money already expended on contract (post-award). *See* Solon Automated Serv., Inc. v. United States, 658 F. Supp. 28 (D.D.C. 1987).

d. Impact on the public interest.

(1) "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982).

(2) "But where an injunction is asked which will adversely affect a public interest, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the right of the parties, though the postponement may be burdensome to the plaintiff." Yakus v. United States, 321 U.S. 414, 441 (1944). *See also* Pruner v. Department of Army, 755 F. Supp. 362 (D. Kan. 1991) (Injunctive relief pending military's processing of conscientious objector application "would seriously interfere with the public interest in efficient deployment of troops in connection with Operation Desert Shield.").

(3) "We give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." Winter v. Natural Resources Defense Council, Inc. 129 S.Ct. 365, 375 (2008), *citing* Goldman v. Weinberger, 475 U.S. 503, 507 (1986). *But see*, Haitian Centers Council v. McNary, 969 F.2d 1326 (2d Cir. 1992). (the government may not assume that the public interest lies solely with it.)

4. Variations on the general rule:

a. D.C. Circuit: "Under the well known standard set forth in this Circuit, four factors control the Court's discretion to grant a motion for a preliminary injunction: the likelihood that the plaintiff will

prevail on the merits, the degree of irreparable injury that the plaintiff will suffer if the injunction is not issued, the harm to the defendant if the motion is granted, and the interest of the public. . . In the event that the last three factors favor the issuance of an injunction, a movant can satisfy the first factor by raising a serious question on the merits of the case." Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

b. 1st Circuit.

(1) "We recognize that a finding attributing great weight to one of the four components may make up for a relatively weak finding as to another. If the chances of success are good, but not the highest, and the adverse effect on the public interest very serious should the prognostication prove mistaken, the public interest might require that the injunction be denied." Mariani Giron v. Acevedo Ruiz, 834 F.2d 238, 240 (1st Cir. 1987).

(2) Post-*Winter*: Vaqueria Tres Monjitas, Inc. V. Irizarry, 587 F.3d 464 (1st Cir. 2009)(Sliding scale applied; no mention of *Winter*.)

c. 2d Circuit.

(1) "The standard in this Circuit for the issuance of a preliminary injunction requires the moving party to establish (1) irreparable harm and (2) either (a) a likelihood of success on the merits, or (b) a sufficiently serious ground for litigation and a balance of the hardships tipping decidedly in its favor." Britt v. United States Army Corps of Eng'rs, 769 F.2d 84 (2d Cir. 1985).

(2) Post-*Winter*: "We have found no command from the Supreme Court that would foreclose the application of our established 'serious questions' standard as a means of assessing a movant's likelihood of success on the merits." Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund, Ltd., 598 F.3d 30, 38 (2d Cir. 2010).

d. 3d Circuit: Plaintiff must show both likelihood of success on the merits and probability of irreparable harm, and the district court should consider the effect of issuance of injunction on other interested persons and the public interest. Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86 (3d Cir. 1992).

e. 4th Circuit.

(1) "On a motion for a preliminary injunction, the district court is first to balance the likelihood of harm to the plaintiff if the temporary injunction is not issued against the likelihood of harm to the defendant if the injunction is issued. If the harm to the plaintiff greatly outweighs the harm to the defendant, then enough of a showing has been made to permit the issuance of an injunction, and the plaintiff need not show a likelihood of success on the merits, for a grave or serious question is sufficient. But as the harm to the plaintiff decreases, when balanced against harm to the defendant, the likelihood of success on the merits becomes important." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048 (4th Cir. 1985); Blackwelder Furniture Co. v. Selig Mfg. Co., 550 F.2d 189 (4th Cir. 1977); *see also*, Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991).

(2) *But see,* Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 347 (4th Cir. 2009)(holding that the circuit's sliding scale test, which permitted "flexible interplay" among the elements, "may no longer be applied" after *Winter*.)

f. 5th Circuit: The four prerequisites for the relief of a preliminary injunction are as follows: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) the threatened injury to plaintiff must outweigh the threatened harm the injunction may do to defendant, and (4) granting the preliminary injunction will not disserve the public interest. Wiggins v. Secretary of the Army, 751 F. Supp. 1238 (W.D. Tex. 1990), *aff'd*, 946 F.2d 892 (5th Cir. 1991).

g. 6th Circuit.

(1) Where factors other than likelihood of success on the merits all are strongly in favor of a preliminary injunction, an injunction may be issued if the merits present a sufficiently serious question to justify further investigation. In re Delorean Motor Co., 755 F.2d 1223, 1230 (6th Cir. 1985).

(2) Looks like the 9th Circuit's "serious questions" test.

h. 7th Circuit: "P x H > (1 - P) x H."

(1) A district court may grant a preliminary injunction "only if the harm to the plaintiff if the injunction is denied, multiplied by

the probability that the denial would be an error (that the plaintiff, in other words, will win at trial), exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error." American Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589 (7th Cir. 1985). *See also* Schultz v. Frisby, 807 F.2d 1339, 1343 (7th Cir. 1986), *aff'd on rehearing*, 822 F.2d 642 (7th Cir. 1987) (en banc); Roland Mach. Co. v. Dresser Ind., Inc., 749 F.2d 380, 386-88 (7th Cir. 1984).

(2) Post-*Winter*: "How strong a claim on the merits is enough depends on the balance of harms; the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief." Hoosier Energy Rural Elec. Co-Op., Inc. v. John Hancock Life Ins. Co., 582 F.3d 721, 725 (7th Cir. 2009).

i. 8th Circuit.

(1) "[T]he essential inquiry in weighing the propriety of issuing a preliminary injunction is whether the balance of other factors tips decidedly toward the movant and the movant has also raised questions so serious and difficult as to call for more deliberate investigation." General Mills, Inc. v. Kellogg Co., 824 F.2d 622, 624-25 (8th Cir.1987).

(2) "Serious" *and* "difficult" questions?

(3) Sierra Club v. U.S. Army Corps of Engineers, 645 F.3d 978 (8th Cir. 2011)(Citing *Winter*, applied traditional test; irreparable harm can flow from a violation of NEPA itself.)

j. 9th Circuit.

(1) "To succeed on a motion for a preliminary injunction the movant must show 'either (1) a combination of probable success on the merits and a possibility of irreparable injury or (2) that serious questions are raised and the balance of the hardships tips sharply in the moving party's favor.'" Hale v. Department of Energy, 806 F.2d 910, 914 (9th Cir. 1986), *quoting* Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1201 (9th Cir. 1980). *But cf.* Hartikka v. United States, 754 F.2d 1516 (9th Cir. 1985) (Sampson v. Murray controls in public employment cases).

(a) *But see*, Winter v. Natural Resources Defense Council, 555 U.S. 7 (2008), "We agree with the Navy that the Ninth Circuit's 'possibility' standard is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction."

(b) *Also see,* Alliance for the Wild Rockies v. Cottrel, 632 F.3d 1127, 1131-1132 (9th Cir. 2011)("For the reasons that follow, we hold that the 'serious questions' approach survives *Winter* when applied as part of the four-element *Winter* test. In other words, 'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met.")

k. 10th Circuit: "Where the movant for a preliminary injunction prevails on the factors other than likelihood of success on the merits, it is ordinarily sufficient that the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation."

--City of Chanute v. Kansas Gas & Electric Co., 754 F.2d 310, 314 (10th Cir. 1985); Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980).

l. 11th Circuit: To obtain a preliminary injunction, the plaintiff must prove: (1) that it has a substantial likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that the injury to the moving party from denial of injunctive relief outweighs the damage to the other party if it is granted; and (4) that the injunction will not harm the public interest.

--GSW, Inc. v. Long County, Georgia, 999 F.2d 1508 (11th Cir. 1993).

m. Fed. Circuit: In determining whether to issue a preliminary injunction, there are four relevant factors: (1) degree of immediate irreparable harm to the plaintiff; (2) degree of harm to the party to be enjoined; (3) the impact of the injunction on public policy considerations, and (4) the likelihood of plaintiff's ultimate success on the merits. These competing elements must be simultaneously weighed.

--We Care, Inc. v. Ultra-Mark, International Corp. 930 F.2d 1567 (Fed. Cir. 1991).

IV. PERMANENT INJUNCTIONS.

A. Elements. Monsanto Co., et al., v. Geertson Seed Farms, et al., 130 S.Ct. 2743 (2010).

1. Plaintiff has suffered an irreparable injury.

2. Remedies available at law, such as monetary damages, are inadequate to compensate for that injury.

3. Considering the balance of hardships between plaintiff and defendant, a remedy in equity is warranted.

4. Public interest would not be disserved by a permanent injunction.

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FEDERAL LITIGATION COURSE

CHAPTER G

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[1] This document was prepared by Doug Mickle and the information set forth in this outline is the view of Doug Mickle, and has not been endorsed by the Department of Justice. It is current as of 19 August 2013

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CONTRACT DISPUTES ACT AND BID PROTEST

LITIGATION AT THE COURT OF FEDERAL CLAIMS ("COFC")

I. INTRODUCTION.

A. Court of national jurisdiction, established in 1855 to handle certain types of claims against the United States.

B. Jurisdiction – Suits primarily for money, arising out of money-mandating statutes, Constitutional provisions, Executive orders, Executive agency regulations, and contracts.

1. 42% - Government contracts.

2. 16% - Civilian and military pay.

3. 13% - tax refunds (concurrent jurisdiction with United States district courts).

4. 9% - Fifth Amendment takings, including environmental and natural resource issues.

5. 20% - Miscellaneous.

a. Various claims pursuant to statutory loan guarantee or benefit programs, including those brought by states and localities, and foreign governments.

b. Congressional reference cases. 28 U.S.C. § 1492.

c. Intellectual property claims against the United States (and its contractors). 28 U.S.C. § 1498.

d. Indian Tribe claims. 28 U.S.C. § 1505.

6. Vaccine compensation claims. 42 U.S.C. § 300aa-12.

C. Limitation on Remedies

1. Generally, money damages.

2. Pursuant to the Tucker Act, the Court may provide limited forms of equitable relief, including:

   a. Reformation in aid of a monetary judgment, or rescission instead of monetary damages. John C. Grimberg Co. v. United States, 702 F.2d 1362 (Fed. Cir. 1983); Paragon Energy Corp. v. United States, 645 F.2d 966 (Ct. Cl. 1981); Rash v. United States, 360 F.2d 940 (1966).

   b. "[T]o grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief" in bid protest cases. 28 U.S.C. § 1491(a)(3).

   c. Records correction incident to a monetary award, such as correcting military records to reflect a Court finding of unlawful separation. See 28 U.S.C. § 1491(a)(2).

   d. Pursuant to the Contract Disputes Act ("CDA"), the COFC also may entertain certain nonmonetary disputes.

3. The Court may award Equal Access to Justice Act ("EAJA") attorney fees. 28 U.S.C. § 2412.

D. Composition. 28 U.S.C. §§ 171-172.

1. Composed of 16 judges (and now has 10 more in senior status).

2. Chief Judge is Emily C. Hewitt.

3. President appoints judges for 15-year term with advice and consent of the Senate. President may reappoint after initial term expires.

4. The Court of Appeals for the Federal Circuit ("CAFC") may remove a judge for incompetence, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability.

E. Location.

1. 717 Madison Place, N.W., Washington, D.C. (across from White House and Treasury).

2. Routinely schedules trials throughout the country, 28 U.S.C. §§ 173 ("times and places of the sessions of the [COFC] shall be prescribed with

a view to securing reasonable opportunity to citizens to appear … with as little inconvenience and expense to citizens as is practicable"), 2503(c), and 2505 ("[h]earings shall, if convenient, be held in the counties where the witnesses reside"). The Court also conducts telephonic hearings, motions, and status conferences.

3. Unlike the boards for contract appeals ("BCAs"), however, prior to 1992, the COFC could not conduct trials in foreign countries. 28 U.S.C. § 2505; In re United States, 877 F.2d 1568 (Fed. Cir. 1989). The Federal Courts Administration Act ("FCAA") of 1992 remedied this. See 28 U.S.C. §798(b).

F. Case Load.

1. FY 2010, the COFC disposed of 713 complaints (including Congressional Reference) and 504 vaccine petitions. The total amount claimed was $73,287,071,000.00. Of the cases disposed of, the Court rendered judgments for claimants in the sum of $902,963,141.45 of which $45,495,336.39 carried interest. The COFC rendered judgments for the United States on counterclaims or offsets in the amount of $1,275,876.73. The Court had 89 bid protests.

2. FY 2008, the COFC disposed of 872 complaints (including Congressional Reference) and 294 vaccine petitions. The total amount claimed was $10,108,961,000.00. Of the cases disposed of, the Court rendered judgments for claimants in the sum of $1,287,014,725.40 of which $31,835,607.84 carried interest. The Court had 92 bid protests.

3. In FY 2006, the Court rendered judgments in more than 900 cases and awarded $1.9 billion in damages.

4. In FY 2003, the Court disposed of 732 complaints, including 45 bid protests, and awarded judgments totaling $ 878 million on claims totaling $ 40 billion against the Government.

5. Web site (includes judges' bios): http://www.uscfc.uscourts.gov//

II. HISTORY OF THE COURT.

A. Pre-Civil War.

1. Before 1855, Government contractors had no forum in which to sue the United States.

2. In 1855, the Congress created the Court of Claims as an Article I (legislative) court to consider claims against the United States and recommend private bills to Congress. Act of February 24, 1855, 10 Stat. 612.

3. However, the service secretaries continued to resolve most contract claims. As early as 1861, the Secretary of War appointed a board of three officers to consider and decide specific contract claims. See Adams v. United States, 74 U.S. 463 (1868). Upon receipt of an adverse board decision, a contractor's only recourse was to request a private bill from Congress.

B. Civil War Reforms.

1. In 1863, Congress expanded the power of the Court of Claims by authorizing it to enter judgments against the United States. Act of March 3, 1863, 12 Stat. 765.

2. In 1887, Congress passed the Tucker Act to expand and clarify the Court's jurisdiction. Act of March 3, 1887, 24 Stat. 505 (codified at 28 U.S.C. § 1491).

a. The court has jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). For the first time, a Government contractor could sue the United States as a matter of right.

b. Note: district courts have concurrent jurisdiction with COFC to the extent such claims do not exceed $10,000. 28 U.S.C. § 1346(a)(2) (Little Tucker Act).

C. Agencies Respond.

1. Agencies responded to the Court of Claim's increased oversight by adding clauses to Government contracts that appointed specific agency officials (e.g., the contracting officer or the service secretary) as the final decision-maker for questions of fact.

2. The Supreme Court upheld the finality of these officials' decisions in Kihlberg v. United States, 97 U.S. 398 (1878).

3. The tension between the agencies' desire to decide contract disputes without outside interference and the contractors' desire to resolve disputes in the Court of Claims continued until 1978.

4. This tension resulted in considerable litigation and a substantial body of case law.

D. The Supreme Court Weighs In.

1. In a series of cases culminating in Wunderlich v. United States, 342 U.S. 98 (1951), the Supreme Court upheld the finality (absent fraud) of factual and legal decisions issued under disputes clauses by agency boards of contract appeals.

2. The Supreme Court further held that the Court of Claims could not review board decisions de novo.

E. Congress Reacts.

1. In 1954, Congress passed the Wunderlich Act, 41 U.S.C. §§ 321-322, to reaffirm the Court of Claims' authority to review factual and legal decisions by agency boards of contract appeals.

2. At about the same time, Congress changed the Court of Claims from an Article I (legislative) court to an Article III (judicial) court. Pub. L. No. 83-158, 67 Stat. 226 (1953).

F. The Supreme Court Weighs In Again.

1. In United States v. Carlo Bianchi & Co, 373 U.S. 709 (1963), the Supreme Court held that boards of contract appeals were the sole forum for considering de novo disputes "arising under" a remedy granting clause in the contract.

2. Three years later, the Supreme Court reaffirmed its conclusion in Utah Mining and Constr. Co. v. United States, 384 U.S. 394 (1966).

3. As a result, agency boards of contract appeals began to play a more significant role in the resolution of contract disputes.

G. The Contract Disputes Act (CDA) of 1978.

1. Pub. L. No. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C. §§

601-613).

2. In 1978, Congress passed the CDA to make the claims and disputes process more consistent and efficient.

3. The CDA replaced the previous disputes resolution system with a comprehensive statutory scheme.

H. Federal Courts Improvement Act of 1982.

1. Pub. L. No. 97-164, 96 Stat. 25 (codified 28 U.S.C. §§ 171 et seq., 1494-97, 1499-1503).

2. In 1982, Congress overhauled the Court of Claims and created a new Article I (legislative) court -- named the United States Claims Court -- from the old Trial Division of the Court of Claims. Congress then merged the old Appellate Division of the Court of Claims with the Court of Customs and Patent Appeals to create the Court of Appeals for the Federal Circuit ("CAFC").

I. Federal Courts Administration Act of 1992

1. Pub. L. No. 102-572, 106 Stat. 4506. For legislative history, see, inter alia, S. Rep. No. 102-342, 102d Cong., 2d Sess. (July 27, 1992); H. Rep. No. 102-1006 (October 3, 1992); Senator Heflin's remarks, Volume 138 Cong. Rec. No. 144, at S17798-99 (October 8, 1992).

2. In 1992, Congress changed the name of the Claims Court to the United States Court of Federal Claims ("COFC").

3. Congress expanded the jurisdiction of the COFC to include the adjudication of nonmonetary disputes.

a. The COFC has jurisdiction "to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act." Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (codified at 28 U.S.C. § 1491(a)(2)).

J. The Federal Acquisition Streamlining Act of 1994 ("FASA")

1. Pub. L. No.103-355, 108 Stat. 3243 (1994), slightly altered the Court's jurisdiction.

2. The COFC may direct that the contracting officer render a decision formerly, only the boards of contract appeals (BCAs) could. FASA § 2351(e), amending 41 U.S.C. § 605(c)(4).

3. District courts may request advisory opinions from BCAs. On matters concerning contract interpretation (any issue that could be the proper subject of a contracting officer's final decision), district courts may request that the appropriate agency BCA provide (in a timely manner) an advisory opinion. FASA § 2354, amending 41 U.S.C. § 609. NB: FASA does not permit Federal district courts to request an advisory opinion from the COFC.)

K. The Administrative Dispute Resolution Act of 1996 ("ADRA")

1. Pub. L. No. 104-320, § 12 (1996), significantly altered COFC and U.S. District Court "bid protest jurisdiction." See 28 U.S.C. § 1491(b).

2. Jurisdiction extends to actions "in connection with a procurement or proposed procurement." Extends beyond "bid protests," e.g., GAO override decisions.

3. Statutorily-Prescribed Standing Requirement("interested party").

a. "Interested party" has same meaning as in CICA (actual or prospective bidder whose direct economic interest would be affected by an award). AFGE, AFL-CIO v. United States, 258 F.3d 1294 (2001). (NB: narrower than APA definition.)

b. This means protester must submit a bid/proposal, Impresa Construcioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1334 (Fed. Cir. 2001); not be a bidder ranked below second in an agency's evaluation, United States v. IBM Corp., 892 F.2d 1006 (Fed. Cir. 1989); and be responsive. Ryan Co. v. United States, 43 Fed. Cl. 646 (1999) (citing IBM), and MCI Telecom. Corp. v. United States, 878 F.2d 362 (Fed. Cir. 1989)).

4. Empowered the Court to grant declaratory and injunctive relief to fashion a remedy. Monetary relief, however, is limited to bid preparation and

proposal costs.

5. Granted same jurisdiction to district courts until January 1, 2001, unless jurisdiction was renewed. It was not.

6. APA standard of review, 5 U.S.C. § 706.

III. PRACTICAL EFFECTS ON LITIGATION.

A. The Judge.

1. 28 U.S.C. § 173.

2. One judge presides and decides - NO JURY TRIALS. RCFC 38 & 39.

B. The Plaintiff.

1. RCFC 17.

2. Individuals may represent themselves or members of their immediate family. Any other party must be represented by an attorney who is admitted to practice in the COFC. RCFC 83.1(a)(3).

3. Note: at ASBCA atty. not required.

C. The Defendant = "The United States."

1. Counsel = Department of Justice ("DOJ"). 28 U.S.C. §§ 516, 518-519. The DOJ has plenary authority to settle cases pending in the COFC. See 28 U.S.C. § 516; see also Executive Business Media v. Dept. of Defense, 3 F.3d 759 (4th Cir. 1993).

2. The National Courts Section of the Civil Division's Commercial Litigation Branch, located in Washington, D.C., represents the Government in all contract actions.

D. Practical Effect Upon Agency Once Case If Filed.

1. The agency loses authority over the case's disposition.

2. The contracting officer loses authority to decide or settle claims arising

out of the same operative facts. The Sharman Co., Inc. v. United States, 2 F.3d 1564 (1993).

3. The agency counsel, because there is only one "attorney of record" per party, appears "of counsel," and plays a different role than s/he would at the board or even a district court, where SAUSA appointments are commonplace.

4. Effect of "United States" as defendant. Who is DOJ's client?

E. Applicable Law.

1. Statutes and Federal common law, unless matter controlled by state law, e.g., property rights.

2. Stare Decisis.

a. Supreme Court.

b. United States Court of Appeals for the Federal Circuit.

c. United States Court of Claims. South Corp. v. United States, 690 F.2d 1368 (Fed. Cir. 1982) (en banc).

d. Judges not bound by the decisions of the other COFC judges.

e. Unpublished decisions may be cited.

3. Procedural Rules

a. The Rules of the Court of Federal Claims ("RCFC"), which are based upon the Federal Rules of Civil Procedure, are published as an appendix to Title 28 of the United States Code.

b. Special Orders – The old version of RCFC 1 permitted the judges to "regulate the applicable practice in any manner not inconsistent with these rules." Thus, most judges adopted specialized procedural orders, regulating enlargements of time, dispositive motions in lieu of answers, other dispositive motion requirements, mandatory disclosure, joint preliminary status reports, preliminary status conferences, discovery, experts, and submissions. Although the new rules do not specifically address this practice, many judges still issue special orders.

F. Electronic docket.

1. Public Access to Court Electronic Records ("PACER") is an electronic public access service that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts, and the U.S. Party/Case Index via the Internet.

2. CM/ECF stands for Case Management / Electronic Case Files. It is a joint project of the Administrative Office of the U.S. Courts and the Federal courts to replace existing case management systems with a new system based on current technology, new software and increased functionality. This new system allows us to offer web access to the Court's docket 24 hours a day, 7 days a week and to allow electronic document filing in designated cases.

3. Electronic docket basically mandates that the agency have scanning capabilities.

IV. COFC JURISDICTIONAL ISSUES.

A. Waiver of Sovereign Immunity.

Tucker Act waives sovereign immunity, but the "substantive right" claimed, whether it be the Constitution, an Act of Congress, a mandatory provision of regulatory law, or a contract, must be one which "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007-1009, 178 Ct. Cl. 599, 605-607 (1967).

B. Tucker Act - General.

1. Must be brought within six years of date claim arose. 28 U.S.C. § 2501; Soriano v. United States, 352 U.S. 270, 273 (1956); Hopland Band of Pomo Indians v. United States, 855 F.2d 1573 (Fed. Cir. 1988). This is jurisdictional.

2. Equitable tolling: Irwin v. Veterans Admin., 498 U.S. 89 (1990) (rebuttable presumption that equitable tolling may be applied against the United States in the same manner as against private parties); Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998). But see, John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008) (holding that 28 U.S.C. § 2501 is jurisdictional and thus equitable tolling and estoppel do not extend the

six-year statute of limitations embedded in 28 U.S.C. § 2501).

3. NAFIs:

(1) **OLD RULE:** Generally must involve an appropriated fund activity. AINS, Inc. v. United States, 365 F.3d 1333 (Fed. Cir.2004); Furash & Company v. United States, 252 F.3d 1336 (Fed. Cir. 2001); El-Sheikh v. United States, 177 F.3d 1321 (Fed. Cir. 1999)(finding that Tucker Act jurisdiction over NAFIs is limited to claims based upon a contract, but holding that jurisdiction may be supplied through another statute waiving sovereign immunity, such as the FLSA).

(2) **NEW RULE:** Federal Circuit just held, en banc, that Tucker Act jurisdiction encompasses NAFs. See Slattery v. United States, 635 F.3d 1298 (2011).

4. Money claimed must be presently due and payable. United States v. King, 395 U.S. 1, 3 (1969).

5. May not also be pending in any other court. 28 U.S.C. § 1500; Loveladies Harbor v. United States, 27 F.3d 1545 (Fed. Cir. 1994) (en banc); United States v. Tohono O'Odham Nation, U.S. , 131 S.Ct. 1723, 1731 (2011) ("Two suits are for or in respect to the same claim, precluding jurisdiction in the CFC, if they are based on substantially the same operative facts, regardless of the relief sought in each suit."); Note order of filing rule still in effect.

6. May not grow out of or be dependent upon a treaty. 28 U.S.C. § 1502.

7. May not be brought by a subject of a foreign government unless the foreign government accords to citizens of the United States the right to prosecute claims against that government in its courts. 28 U.S.C. § 2502; Zalcmanis v. United States, 146 Ct. Cl. 254 (1959).

C. Tucker Act - Claims Founded Upon Contract.

1. Must demonstrate elements necessary to establish the existence of a contract (e.g., meeting of minds, consideration). E.g., Somali Dev. Bank v. United States, 205 Ct. Cl. at 751, 508 F.2d at 822; Algonac Mfg. Co. v. United States, 192 Ct. Cl. 649, 673-74, 428 F.2d 1241, 1255 (1970); ATL, Inc. v. United States, 4 Cl. Ct. 672, 675 (1984), aff'd, 735 F.2d 1343 (Fed. Cir. 1984).

2. Must demonstrate that it was entered into by authorized Government official. E.g., City of El Centro v. United States, 922 F.2d 816 (Fed. Cir. 1990).

3. Must demonstrate "privity of contract." Erickson Air Crane Co. v. United States, 731 F.2d 810, 813 (Fed. Cir. 1984); United States v. Johnson Controls, Inc., 713 F.2d 1541, 1557 (Fed. Cir. 1983); see Cienega Gardens, et al. v. United States, 162 F.3d 1123, 1129-30 (Fed. Cir. 1998).

4. If "implied," must be implied-in-fact, not implied- in-law. Merritt v. United States, 267 U.S. 338, 341 (1925); Tree Farm Dev. Corp. v. United States, 218 Ct. Cl. 308, 316, 585 F.2d 493, 498 (1978); Algonac Manufacturing Co. v. United States, 192 Ct. Cl. 649, 674, 428 F.2d 1241, 1256 (1970).

5. Cannot be for the performance of covert or secret services; not all "agreements" within Congress' contemplation of contract claims under Tucker Act. Totten v. United States, 92 U.S. 105 (1875); Guong v. United States, 860 F.2d 1063 (Fed. Cir. 1988).

6. "Grants" which create formal obligations have been found sufficient for jurisdiction even though they do not appear to satisfy all elements necessary for a contract; however, Government bound only by its express undertakings. Missouri Health & Med. Organization v. United States, 226 Ct. Cl. 274 (1981); Thermalon Indust., Ltd. v. United States, 34 Fed. Cl. 411 (1995).

D. Claims Founded Upon Statute Or Regulation.

1. Civilian personnel pay claims: e.g., Equal Pay Act, 5 U.S.C. § 5101; Federal Employment Pay Act, 5 U.S.C. § 5542 et seq.; Fair Labor Standards Act, 29 U.S.C. §§ 201-219.

2. Military personnel pay claims: A service member's status in the armed forces is defined by the statutes and regulations which form the member's right to statutory pay and allowances. Bell v. United States, 366 U.S. 393 (1961).

E. Claims for Money Unlawfully Exacted Or Retained. Jurisdiction to entertain claim for return of money paid by claimant under protest upon grounds illegally exacted or retained. Aerolineas Argentinas v. United States, 77 F.3d 1564 (Fed. Cir. 1996).

F. Constitutional Provisions and Statutes That Do Not Waive Sovereign Immunity

1. 1st, 4th, and 5th Amendments (except Takings Clause).

2. Administrative Procedure Act. Califano v. Sanders, 430 U.S. 99, 107 (1977)

3. Declaratory Judgment Act (28 U.S.C. § 2201). United States v. King, 395 U.S. 1, 5 (1969).

V. INITATING SUIT

A. Action Commenced With A Complaint.

1. A "short and plain" statement showing jurisdiction and entitlement to relief, and demanding judgment for the relief sought. RCFC 8(a).

2. In addition, the complaint must contain:

(1) A statement regarding any action taken on the claim by Congress, a department or agency of the United States, or another tribunal, RCFC 9(o);

(2) A citation to any statute, regulation, or Executive order upon which the claim is founded, RCFC 9(j); and

(3) Identification of any contract on which the claim is founded, as well as a description or attached copy of the contract. RCFC 9(k).

3. Compare: At BCAs, action commenced with notice of appeal.

B. Statute of Limitations.

1. Contract claims. Generally, six years. 28 U.S.C. § 2501.

2. The COFC generally considers the Clerk of Court's record of receipt to be final and conclusive evidence of the date of filing. But the Court will deem a late complaint timely if the plaintiff:

(1) Sent the complaint to the proper address by registered or certified mail, return receipt requested;

(2) Deposited the complaint in the mail far enough in advance

of the due date to allow delivery by the due date in the ordinary course of the mail; and

(3) Exercised no control over the complaint from the date of mailing to the date of delivery. See B.D. Click Co. v. United States, 1 Cl. Ct. 239 (1982) (holding that the contractor failed to demonstrate the applicability of exceptions to timeliness rules).

C. The "Call Letter."

1. 28 U.S.C. § 520.

2. The Attorney General must send a copy of the complaint to the responsible military department, along with a request for all of the facts, circumstances, and evidence concerning the claim that are within the military department's possession or knowledge.

3. The responsible military department must then provide the Attorney General with a "written statement of all facts, information, and proofs."

4. "Do not destroy" reminder.

5. Don't wait for the call letter before contacting us. DOJ is usually the last to know when a complaint is filed.

VI. RESPONDING TO THE COMPLAINT.

A. The Answer.

1. RCFC 8, 12, and 13.

2. The Government must either respond with a motion under RCFC 12 or file its answer within 60 days of the date it receives the complaint.

3. If the Government submits an answer, the Government must admit or deny each averment in the complaint.

4. If the Government lacks sufficient knowledge or information to admit or deny a particular averment, the Government must say so.

5. If the Government only intends to oppose part of an averment, the Government must specify which part of the averment is true and deny the rest.

6. Generally, DOJ files bare bones admissions and denials. Compare with ASBCA practice. However, each such statement must be supportable. See discussion of Rule 11, below.

B. Defenses.

1. RCFC Nos. 8 and 12.

2. If an answer is required, the Government must plead every factual and legal defense to a claim for relief.

3. Where appropriate, the Government asserts the following defenses by motion:

(1) Lack of subject-matter jurisdiction;

(2) Lack of personal jurisdiction;

(3) Insufficiency of process; and

(4) Failure to state a claim upon which the Court may grant relief.

4. If an answer is required, the Government must plead the following affirmative defenses:

(1) "accord and satisfaction,

(2) arbitration and award,

(3) discharge in bankruptcy,

(4) duress,

(5) estoppel,

(6) failure of consideration,

(7) fraud, illegality,

(8) laches,

(9) license,

(10) payment,

(11) release,

(12) res judicata,

(13) statute of frauds,

(14) statute of limitations,

(15) waiver, and

(16) any other matter constituting an avoidance or affirmative defense." RCFC 8(c).

C. Counterclaims.

1. RCFC 13.

2. To preserve its right to judicial enforcement of a claim, the Government must state any claim it has against the plaintiff as a counterclaim if:

    a. The claim arises out of the same transaction or occurrence as the plaintiff's claim; and

    b. The claim does not require the presence of third parties for its adjudication.

3. The Government may state any claims not arising out of the same transaction or occurrence as the plaintiff's claim as counterclaims.

D. Signing Pleadings, Motions, and Other Papers.

1. RCFC 11.

2. The attorney of record must sign every pleading, motion, and other paper. The attorney's signature constitutes a certification that the attorney has read the pleading, motion, or other paper; that to the best of the attorney's knowledge, information, and belief formed after reasonably inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

3. The COFC will strike a pleading, motion, or other paper if the attorney does not promptly sign it after the omission of the attorney's signature is brought to the attorney's attention.

4. The COFC will impose appropriate sanctions against the attorney and/or the represented party if the attorney signs a pleading, motion, or other paper in violation of this rule.

E. Early Meeting of Counsel.

1. RCFC, App. A, Pt. II.

2. The parties must meet after the Government files its answer to:

a. Identify each party's factual and legal contentions;

b. Discuss each party's discovery needs and discovery schedule; and

c. Discuss settlement.

d. As a practical matter, DOJ orchestrates this.

F. Joint Preliminary Status Report (JPSR).

1. RCFC, App. A, Pt. III.

2. The parties must file a JPSR no later than 49 days after the Government answers or plaintiff files its reply to a Government counter-claim.

3. The JPSR must set forth answers to the following questions:

(1) Does the Court have jurisdiction?

(2) Should the case be consolidated with any other action?

(3) Should trial of liability and damages be bifurcated?

(4) Should further proceedings be deferred pending consideration of another case? Consider 28 U.S.C. § 1500; UNR Indus., Inc. v. United States, 962 F.2d 1013 (1992), cert. granted, 113 S. Ct. 373(1992); Keene Corn. v. United States, 113 S. Ct. 2035 (1993). Subsequent interpretations of 28 U.S.C. § 1500 include: Wilson v. United States, 32 Fed. Cl. 794 (1995) (same recovery in both actions); McDermott. Inc. v. United States, 30 Fed. Cl. 332 (1994) (constitutional claims and challenges to Federal statutes pending in a district court action not the same as the contract actions before the COFC); Marshall Assoc. Contractors Inc. v. United States, 31 Fed. Cl. 809 (1994) (surety's suit against the United States pending in another Federal court not a jurisdictional bar to contractor's suit before the COFC).

(5) Will a remand or suspension be sought?

(6) Will additional parties be joined?

(7) Does either party intend to file a motion to dismiss for lack of jurisdiction, failure to state a claim, or summary judgment? If so, a schedule.

(8) What are the relevant issues?

(9) What is likelihood of settlement?

(10) Do the parties anticipate proceeding to trial? If so, does any party want to request expedited trial scheduling?

(11) Is there any other information of which the court should be made aware?

(12) What do the parties propose for a discovery plan and deadlines?

VII. BASIS FOR RESPONSE - THE LITIGATION REPORT.

A. The agency is required, by statute, to file a litigation report. 28 U.S.C. § 520(b).

B. Army Regulation 27-40, paragraph 3-9 requires the SJA or legal advisor to prepare the litigation report when directed by Litigation Division. Not a Rule 4 File. Neither the CFC nor the plaintiff sees the report. Err on the side of inclusion, not exclusion. Stamp "Attorney Work Product."

C. AR 27-40, "Litigation." Chapter 3.9, "Litigation Reports."

1. Statement of Facts. A complete statement of the facts on which the action and any possible Government defenses are based. Where possible, support facts by reference to documents or witness statements. Include details of previous administrative actions, such as the filing and results of an administrative claim.

2. Setoff or Counterclaim. Identify with supporting facts.

3. Responses to Pleadings. Prepare a draft answer or other appropriate response to the pleadings. (See fig 3-1, Sample Answer). Discuss whether allegations of fact are well-founded. Refer to evidence that refutes factual allegations.

4. Memorandum of Law.

(1) "Include a brief statement of the applicable law with citations to legal authority. Discussions of local law, if applicable, should cover relevant issues such as measure of damages . . . . Do not unduly delay submission of a litigation report to prepare a comprehensive memorandum of law."

(2) Identify jurisdictional defects and affirmative defenses.

(3) Assess litigation risk. Do not hesitate to form (and support) a legal opinion. Give a candid assessment of the potential for settlement.

5. Potential witness information. List each person having information relevant to the case and provide an office address and telephone number. If there is no objection, provide the individual's social security account number, home address, and telephone number. This is "core information" required by Executive Order No. 12778 (Civil Justice Reform). Finally, summarize the information or potential testimony that each person listed could provide." NB: DOJ usually does not require SSNs, but it really needs to know witnesses' expected availability (retiring? PCS'ing to Greenland?).

6. Exhibits – "Attach a copy of all relevant documents . . . . Copies of relevant reports of claims officers, investigating officers, boards, or similar data should be attached, although such reports will not obviate the requirement for preparation of a complete litigation report . . . Where a relevant document has been released pursuant to a Freedom of Information Act (FOIA) request, provide a copy of the response, or otherwise identify the requestor and the records released.

7. Draft an answer.

8. Identify documents and information targets for discovery. Think about things you know exist or must exist that will help the agency position as well as things that might exist that might undermine the agency's position.

9. Consider drafting a motion to dismiss for lack of jurisdiction, RCFC 12(b)(1), or for failure to state a claim, RCFC 12(b)(6).

10. Consider drafting motion for summary judgment, RCFC 56. NB: RCFC 56(d) requires that the moving party file a separate document entitled Proposed Findings of Uncontroverted Fact, and that the responding party file a "Statement of Genuine Issues," and permits the responding party to file proposed findings of uncontroverted facts.

11. Analyze the Client.

12. If the plaintiff's position is unbelievable, there is some chance the agency has simply misunderstood it (perhaps because the position was poorly presented). Identify the questions that will assure the Government understands the contractor's point so we can target discovery, properly respond, and be assured the Government will not be blind-sided at trial.

13. Identify any agency concerns, uncertainty, hard or soft spots (the contracting officer will fight to the death vs. the contracting officer was surprised the contractor never called to negotiate), witness problems or biases, and anything else you would like to know if you were trying the case.

VIII. DISCOVERY.

A. Discovery scope.

RCFC 26, Appendix A, Pt. V, ¶¶ 9-10.

B. Methods of Discovery.

1. RCFC 26(a).

2. The parties may obtain discovery by depositions upon oral examination or written questions, written interrogatories, requests for the production of documents, and requests for admission.

3. The Court may limit discovery if:

(1) The discovery sought is unreasonably cumulative or duplicative;

(2) The party seeking the discovery may obtain it from a more convenient, less burdensome, or less expensive source;

(3) The party seeking the discovery has had ample opportunity to obtain the information sought; or

(4) The burden or expense of the proposed discovery outweighs its likely benefit.

(5) Remember, defendant is the United States – thus discovery requests could include more than one Federal agency.

C. Protective Orders.

(1) RCFC 26(c) and Form 8.

(2) The court may make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

D. Depositions.

1. RCFC 30.

2. Purpose –

(1) Lock in testimony, pure exploration, testing a theory/confirming a negative.

(2) Need relevant documents to refresh witness's testimony and keep questioning specific.

3. Subpoenas may be served at any place within 100 miles of deposition, hearing or trial. Upon a showing of good cause, a subpoena may be served at any other place. RCFC 45(b)(2).

4. Expenses. RCFC 30(g).

(1) The party taking the deposition must pay the cost of recording the deposition.

(2) Tell DOJ what you will need: disk; condensed (with word index); full. Making copies may or may not be permitted.

5. Defending Subpoenas.

(1) Agency counsel should coordinate service.

(2) If the party that gave notice of the deposition failed to attend (or failed to subpoena a witness who failed to attend), the court may order that party to pay the other party's reasonable expenses, including reasonable attorney's fees.

(3) DOJ should take lead in preparing witnesses, including how much and how to prepare.

(4) Agency may be asked to identify relevant documents and likely questions.

(5) All contact with witness must be coordinated with DOJ.

6. Submission of Transcript to Witness.

(1) RCFC 30(e).

(2) The deponent must examine and read the transcript unless the witness and the parties waive the requirement.

(3) The deponent may make changes; however, the deponent must sign a statement that details the deponent's reasons

for making them.

(4) Agency counsel should coordinate this for agency witnesses.

E. Interrogatories.

1. RCFC 33.

2. The Government may serve interrogatories on the plaintiff after the plaintiff files the complaint, and the plaintiff may serve interrogatories on the Government after the Government receives the complaint.

3. The party upon whom the interrogatories have been served (i.e., the answering party) must normally answer or object to the interrogatories within 30 days of service.

4. The answering party may answer an interrogatory by producing business records if:

(1) The business records contain the information sought; and

(2) The burden of deriving or ascertaining the answer sought is substantially the same for both parties.

(3) The responding party must be specific about where the information can be located. Otherwise, the burden is not the same.

5. The answering party must sign a verification attesting to the truth of the answers. The answering party's attorney must sign the objections.

F. Requests for the Production of Documents.

1. RCFC 34.

2. The rules are similar to the rules for interrogatories.

3. The party producing the records for inspection/copying may either:

(1) Produce them as they are kept in the usual course of business; or

(2) Organize and label them to correspond to the production request.

4. Exercise caution in privilege review: once they've got it, assume we can't take it back. Prepare a draft privilege list of documents withheld, providing sufficient detail to assure recipient can analyze applicability of privilege (usually, to, from, subject, and identify of sender/recipient's office (e.g., "Counsel").

G. Requests for Admission.

1. RCFC 36.

2. The answering party must:

(1) Specifically deny each matter; or

(2) State why the answering party cannot truthfully admit or deny the matter.

3. The answering party may not allege lack of information or knowledge unless the answering party has made a reasonable inquiry into the matter.

4. If the answering party fails to answer or object to a matter in a timely manner, the matter is admitted.

5. Admissions are conclusive unless the court permits the answering party to withdraw or amend its answer.

6. Great tool for narrowing the facts in dispute.

H. Agency Counsel Role in Responding to Interrogatories, Requests for Production and Admissions.

1. Identify who should answer.

2. Inform all potential witnesses and affected activities that a lawsuit has been filed; that, as a normal part of discovery, plaintiff is entitled to inspect and copy all related documents; that "documents" includes electronic documents, such as email and "personal" notes kept in performing official duties, such as field notebooks; that witnesses are not to dispose of any such documents; that they should begin to collect and identify all files related to the lawsuit – including those at home.

3. Current employees also should be told they are represented by DOJ and the contractor is represented by counsel, and they should not talk to the contractor or its attorneys about the lawsuit.

I. Discovery Planning Conference.

1. Agency counsel and answering witnesses should discuss with DOJ a strategy for responding, to include:

(1) Objections in lieu of responses (what we won't tell them);

(2) Objections with limited responses (what we will tell them), e.g., requests for "all documents" or "all information related to."

(3) In which cases will DOJ will produce documents instead of responding to an interrogatory in accordance with RCFC 33(c).

(4) How documents will be organized and stamped, including adoption of a stamping protocol (e.g.. "HQDA0001 . . . ," "AMC0001 . . . .") to identify source of produced documents and to identify them as having been subject to discovery effort.

(5) How copying and inspection will be handled – security concerns? Cost concerns?

2. Preparation of a privilege log. All relevant documents not produced and not covered by an objection must be listed on a privilege log furnished to the other side. Typically, they list to, from, date, subject, and privilege claimed. They should be sufficiently detailed so that the basis for the privilege is evident but does not disclose the privileged matter. E.g., "Ltr. From MAJ Jones, AMC Counsel, to Smith, CO re: claim."

J. Failure to Cooperate in Discovery.

1. Motion to Compel Discovery. RCFC 37(a)(3). If a party or a deponent fails to cooperate in discovery, the party seeking the discovery may move for an order compelling discovery.

2. Expenses. RCFC 37(a)(5). The court may order the losing party or deponent to pay the winning party's reasonable expenses, including

attorney fees.

3. Sanctions. RCFC 37(b).

(1) If a deponent fails to answer a question after being directed to do so by the court, the court may hold the deponent in contempt of court.

(2) If a party fails to provide or permit discovery after being directed to do so, the court may take one or more of the following actions:

(a) Order that designated facts be taken as established for purposes of the action;

(b) Refuse to allow the disobedient party to support or oppose designated claims or defenses;

(c) Refuse to allow the disobedient party to introduce designated facts into evidence;

(d) Strike pleadings in whole or in part;

(e) Stay further proceedings until the order is obeyed;

(f) Dismiss the action in whole or in part;

(g) Enter a default judgment against the disobedient party;

(h) Hold the disobedient party in contempt of court; and

(i) Order the disobedient party—and/or the attorney advising that party—to pay the other party's reasonable expenses, including attorney's fees.

(3) In Mortenson Co. v. United States, 996 F.2d 1177 (Fed. Cir. 1993), the CAFC affirmed a $22 million award of attorney fees and costs against the United States as a Rule 37(a)(4) sanction for the VA's failure to comply with certain discovery orders.

IX. TRIAL.

A. Meeting of counsel.

1. No later than 60 days before the pretrial conference, counsel for the parties shall:

   a. Exchange all exhibits (except impeachment) to be used at trial.

   b. Exchange a final list of names and addresses of witnesses.

   c. To disclose to opposing counsel the intention to file a motion.

   d. Resolve, if possible, any objections to the admission of oral or documentary evidence.

   e. Disclose to opposing counsel all contentions as to applicable facts and law, unless previously disclosed.

   f. Engage in good-faith, diligent efforts to stipulate and agree to facts about which the parties know, or have reason to know, there can be no dispute for the purpose of simplifying the issues at trial.

   g. Exhaust all possibilities of settlement.

2. Ordinarily, the parties must file:

   h. A memorandum of contentions of fact and law;

   i. A joint statement setting forth the factual and legal issues that the court must resolve NLT 21 days before the pretrial conference;

   j. A witness list;

   k. An exhibit list.

3. Failure to identify an exhibit or a witness may cause the Court to exclude the exhibit or witness. Appendix A ¶¶ 13(a), 13(b), 15.

4. The attorneys who will try the case must attend the pretrial conference.

B. Pre-Trial Preparation.

1. Contacting all witnesses -- ensuring none will be gone during trial and that former Government employees have signed representation agreements if they wish to.

2. Outlining Witness Testimony.

3. Preparing Witnesses.

4. Preparing FRE 1006 summaries.

5. Copying and organizing documents.

C. Offers of Judgment.

1. RCFC 68.

2. The Government may make an offer of judgment at any time more than 10 days before the trial begins.

3. If the offeree fails to accept the offer and the judgment the offeree finally obtains is not more favorable than the offer, the offeree must pay any costs the Government incurred after it made the offer.

X. SETTLEMENT.

A. Authority

1. Attorney General has authority to settle matters in litigation, 28 U.S.C. § 516, and has delegated that authority depending upon dollar value of settlement. 28 C.F.R. § 0.160, et seq., e.g., AAG, Civil Division may settle a defensive claim when the principal amount of the proposed settlement does not exceed $2 million.

2. The AAG has redelegated office heads and U.S. Attorneys, but redelegation subject to exceptions, including case where agency opposes settlement.

3. Whether matter is "in litigation," is not always clear. The Sharman Co., Inc. v. United States, 2 F.3d 1564 (1993); Boeing Co. v. United States, Cl. Ct. No. 92-14C (June 3, 1992), reversed 92-5129, 92-5131 (Fed. Cir.,

March 19, 1992) (unpublished); Durable Metal Products v. United States, 21 Cl. Ct. 41, 45 (1990); but see Hughes Aircraft Co. v. United States, 209 Cl. Ct. 446, 465, 534 F.2d 889, 901 (1976). The body of law on this issue continues to develop. See, e.g. Alaska Pulp Corporation v. United States, 34 Fed. Cl. 100 (1995) (default terminations); Volmar Construction, Inc. v. United States, 32 Fed. Cl. 746 (1995) (claims and setoffs); Cincinnati Electronics Corp. v. United States, 32 Fed. Cl. 496 (1994) (default terminations).

4. When in doubt, assume matter is in litigation and all discussions should be made through DOJ.

B. Assume a Discussion About Settlement Is Coming.

1. The agency has little influence on the process when the agency counsel is not sufficiently familiar with case developments to offer a persuasive opinion.

2. Explain to your clients that ADR and, if warranted, settlement are more arrows in the quiver for resolving the dispute.

3. Explain that settlement should be used when it avoids injustice, when the defense is unprovable, when a decision can be expected to create an unfavorable precedent; and when settlement provides a better outcome (including the fact it might include consideration that a court judgment will not) than could be expected from a trial. The availability of expiring contract funds might also be considered.

4. In that regard, help client understand difference between their believing a fact, and it being legally significant and provable.

5. Identify early on who within the agency has authority to recommend settlement, and who within the agency has the natural interest or "pull" to affect that recommendation, such that they should be continually updated on the litigation.

C. Settlement Procedure.

1. Agencies must be consulted regarding "any significant proposed action if it is a party, if it has asked to be consulted with respect to any such proposed action, or if such proposed action in a case would adversely affect any of its policies." U.S. Attorney's Manual, para.4-3.140C (available at www.usdoj.gov).

2. Litigation attorney coordinates with installation attorney and contracting officer to determine whether settlement is appropriate.

3. If settlement deemed appropriate, the litigation attorney prepares a settlement memorandum. Next the litigation attorney, submits the memorandum through the Branch Chief to the Chief, Litigation Division. The Chief, Litigation Division must approve all settlement agreements. He has authority to act on behalf of TJAG and the Secretary of the Army on litigation issues, including the authority to settle or compromise cases. See AR 27-40, paragraph 1-4d(2).

4. Finally, the recommendation of the Chief, Litigation Division is forwarded to the DOJ. Then DOJ goes through a similar process to get approval of a settlement.

XI. ALTERNATIVE DISPUTE RESOLUTION (ADR).

A. The COFC pilot program

1. The COFC pilot program requires that designated cases be automatically referred to an ADR judge; however, the parties may opt out.

2. Each party presents an abbreviated version of its case to a neutral advisor, who then assists the parties to negotiate a settlement. Suggested procedures are set forth in the General Order.

B. ADR Methods

1. The court offers ADR methods for use in appropriate cases.

(1) Use of a settlement judge.

(2) Mini-trial.

2. Both ADR methods are designed to be voluntary and flexible.

3. If the parties want to employ one of the ADR methods, they should notify the presiding judge as soon as possible.

(1) If the presiding judge determines that ADR is appropriate, the presiding judge will refer the case to the Office of the Clerk for the assignment of an ADR judge.

(2) The ADR judge will exercise ultimate authority over the form and function of each ADR method.

(3) If the parties fail to reach a settlement, the Office of the Clerk will return the case to the presiding judge's docket.

XII. POST JUDGMENT.

A. Final Judgment Rule.

1. Unless timely appealed, a final judgment of the court bars any further claim, suit, or demand against the United States arising out of the matters involved in the case or controversy. 28 U.S.C. § 2519.

B. New Trials.

1. 28 U.S.C. § 2515; RCFC 59.

2. The COFC may grant a new trial or rehearing or reconsideration based on common law or equity.

3. The COFC may grant the Government a new trial—and stay the payment of any judgment—if it produces satisfactory evidence that a fraud, wrong, or injustice has been done to it:

(1) While the action is pending in the COFC;

(2) After the Government has instituted proceedings for review; or

(3) Within 2 years after final disposition of the action.

C. Appeals.

1. See generally, Jennifer A. Tegfeldt, A Few Practical Considerations in Appeals Before the Federal Circuit, 3 FED. CIR. BAR. J. 237 (1993).

2. A party may appeal an adverse decision to the CAFC within 60 days of the date the party received the decision. 28 U.S.C. § 2522. See RCFC 72.

3. Solicitor General approves/disapproves appeals by the United States.

D. Paying plaintiff attorney fees.

1. A different attorney fee statute. The Court of Federal Claims grants Equal Access To Justice Act (EAJA) relief pursuant to 28 U.S.C. § 2412, unlike the BCAs, which grant EAJA relief pursuant to 5 U.S.C. § 504. See also, Form 5 in Appendix of the RCFC (application form for EAJA fees).

E. Payment of Judgments.

1. An agency may access the "Judgment Fund" to pay "[a]ny judgment against the United States on a [CDA] claim." 41 U.S.C. § 612(a). See 31 U.S.C. § 1304; cf. 28 U.S.C. § 2517.

2. The Judgment Fund also pays compromises under the Attorney General's authority.

3. If an agency lacks sufficient funds to cover an informal settlement agreement, it may "consent" to the entry of a judgment against it. Bath Irons Works Corp. v. United States, 20 F.3d 1567, 1583 (Fed. Cir. 1994).

4. An agency that accesses the Judgment Fund to pay a judgment must repay the Fund from appropriations that were current at the time the judgment was rendered against it. 41 U.S.C. § 612(c).

XIII. BID PROTESTS AT THE COURT OF FEDERAL CLAIMS

A. COFC jurisdiction to entertain a bid protest must be "in connection with a procurement."

1. The Tucker Act, 28 U.S.C. § 1491(b), as amended by Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320 (October 19, 1996), section 12, provides the Court "jurisdiction to render judgment on an action by an interested party objecting to a **solicitation** by a Federal agency for bids or proposals for a proposed contract or a **proposed award** or the **award** of a contract or any **alleged violation of statute or regulation** in connection with a procurement or a proposed procurement."

2. This jurisdictional mandate has been broadly construed by the Federal Circuit. See Distributed Solutions, Inc. v. United States, 539 F.3d 1340 (Fed. Cir. 2008), Weeks Marine, Inc. v. United States, 575 F.3d 1352 (Fed. Cir. 2009), and Resource Conservation Group, LLC v. United States, 597 F.3d 1238 (Fed. Cir. 2010).

3. COFC bid protest jurisdiction includes pre-award and post-award protests.

   a. Pre-award**:** protests can challenge such things as: an agency's anticipated contract award to an identified low bidder or apparent successful offeror; requirements in a solicitation; alleged de facto sole source specifications; elimination of an offeror from (or improper inclusion of an offeror in) a competitive range; responsiveness and responsibility determinations; any change or amendment to a solicitation that is alleged to prejudice the litigant; any purported illegality or regulatory violation within the solicitation process; etc.

   b. Post-award: protests generally can raise the same challenges as a pre-award protest and, in addition, can challenge the award decision. However, "a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection afterwards in a § 1491(b) action." Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1313 (Fed. Cir. 2007). Moreover, post-award, the relief available may be limited, as a practical and equitable matter, if a protest is filed long after award. This does not, however, necessarily make the protest untimely.

4. Relief.

   (1) COFC injunctive authority allows Court to issue temporary restraining orders for a maximum of 28 days, a preliminary or permanent injunction, and may award bid and proposal preparation costs if the plaintiff is successful on the merits. PGBA, LLC v. United States, 389 F.3d 1219, 1225-27 (Fed. Cir. 2004). Purely declaratory relief is usually of minimal significance in bid protests. Any coercive order of the court requiring an agency to do, or not do, something in connection with a procurement is treated as injunctive relief and requires weighing the equities. PGBA, 389 F.3d at 1228.

   (2) Court's grant of relief may include ordering the termination of a contract that has been awarded, the court cannot order a contract award to a particular bidder. United Int'l Investig. Servs., Inc. v. United States, 41 Fed. Cl. 312, 323-24 (1998) (citing Hydro Eng'g, Inc. v. United States, 37 Fed. Cl. 448, 461 (1997), and Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859, 869 (D.C. Cir. 1970)).

Practice Tip: Pursuant to RCFC 65(c) the Court must have plaintiff post a bond if a TRO/PI is issued. However, the Court has discretion on the amount of the bond, so we have the burden of establishing the amount of damages that will be incurred during the pendency of the injunction. Plan to have a declaration by the contracting officer addressing the costs, and any other harm the agency will suffer, in the event the procurement is enjoined.

5. Override of the automatic stay in CICA.

a. The Competition in Contract Act ("CICA"), 31 U.S.C. § 3553, requires the agency to suspend performance of the contract during the pendency of the GAO protest. 31 U.S.C. § 3553(d)(3)(A) and (B). However, CICA permits agency to override the stay provision if agency finds in a determination and findings ("D & F") that continued performance is (1) in the best interests of the United States, or (2) urgent and compelling circumstances that significantly affect interests of the United States will not permit delay. Id. at § 3353(d)(3)(C).

b. COFC may review. RAMCOR Servs. Group, Inc. v. United States, 185 F.3d 1286, 1291 (Fed. Cir. 1999); Unisys Corp. v. United States, 2009 WL 5098195 *6 (Fed. Cl. 2009); Spherix, Inc. v. United States, 62 Fed. Cl. 497, 503-04 (2003).

c. Override decisions are highly scrutinized by the Court. Recent decisions have applied the "arbitrary and capricious" standard rather than those announced in Reilly's Wholesale Produce v. United States, 73 Fed. Cl. 705 (2006). See PMTech, Inc. v. United States, 95 Fed. Cl. 330 (2010), Planetspace, Inc. v. United States, 86 Fed. Cl. 566 (2009), The Analysis Group, LLC v. United States, 2009 WL 3747171, 3 Fed. Cl. (2009), and Frontline Healthcare Workers Safety Foundation, Ltd. v. United State, 2010 WL 637790, 1, Fed. Cl. (2010).

d. If your agency is considering an override, contact us before the D & F is finalized.

B. Standard of Review.

1. Limited to Administrative Record.

(1) The scope of the review is limited to the administrative

record. Bannum, Inc. v. United States, 404 F.3d 1346, 1355-56 (Fed. Cir. 2005) (the court resolves issues of law and decides all necessary issues of fact based upon the administrative record created before the agency); see also, Camp v. Pitts, 411 U.S. 138, 142-43 (1973) (the proper focus of the court's scrutiny is the agency's articulated rationale for the decision, and the administrative record underlying it); Cincom Sys., Inc. v. Untied States, 37 Fed. Cl. 663, 671 (1997).

(2) RCFC 52.1(b) provides the standard for review of agency action on the basis of the administrative record. See, A & D Fire Protection, Inc. v. United States, 72 Fed. Cl. 126, 131 (2006).

(3) Pursuant to RCFC 52,1(b), the court decides whether "given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence in the record." Id. (citing Bannum, Inc. v. United States, 404 F.3d 1346, 1356 (Fed. Cir. 2005).

(4) The plaintiff bears the burden of meeting this standard by a preponderance of the evidence. Rotech Healthcare, Inc. v. United States, 71 Fed. Cl. 393, 401 (2006).

2. Administrative Procedure Act.

a. Judicial review of the agency's actions in a bid protest is not a de novo proceeding.

In the bid protest context, the Court resolves challenges to agency actions under the standards provided in the Administrative Procedure Act, 5 U.S.C. § 706. *See* 28 U.S.C. § 1491(b)(4) (incorporating by reference Administrative Procedure Act's standard of review); Bannum, Inc. v. United States, 404 F.3d 1346, 1351 (Fed. Cir. 2005); Impressa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001).

b. The Court's standard of review in bid protests is "highly deferential." Advanced Data Concepts, Inc. v. United States, 216 F.3d 1054, 1057 Fed. Cir. 2000).

c. An agency's contracting decision may be set aside only if it

is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." The Centech Group, Inc. v. Untied States, 554 F.3d 1029, 1037 (Fed. Cir. 2009); Impressa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001); see also, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), overruled on other grounds by, Califano v. Sanders, 430 U.S. 99 (1977); The Cube Corp. v. United States, 46 Fed. Cl. 368, 374 (2000).

d. Pursuant to this standard, the court may set aside a procurement decision upon the protester's showing that "(1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure." Impressa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332-33 (Fed. Cir. 2001); Galen Med. Assoc., Inc. v. United States, 369 F.3d 1324, 1329-31 (Fed. Cir. 2004) (decision set aside only if there has been a "clear and prejudicial" violation of law or the agency's decision lacks a rational basis).

3. Presumption of Regularity.

(1) In evaluating an agency's decision, the court "is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); Honeywell, Inc. v. United States, 870 F.2d 644, 648 9Fed. Cir. 1989) (quotations omitted) ("If the court finds a reasonable basis for the agency's action, the Court should stay its hand even though it might, as an original proposition, have reached a different conclusion as to the proper administration and application of the procurement regulations.")

(2) An agency's procurement decisions are entitled to a "presumption of regularity," Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971), and the Court should not substitute its judgment for that of the agency. Redland Genstar, Inc. v. United States, 39 Fed. Cl. 220 (1997); Cincom Sys., Inc. v. United States, 37 Fed. Cl. 663, 672 (1997).

c. The disappointed bidder "bears a heavy burden" and the procurement officer is "entitled to exercise discretion upon

a broad range of issues confronting [her]." Impressa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001).

d. This burden "is not met by reliance on [the] pleadings along, or by conclusory allegations and generalities." Bromley Contracting Co. v. United States, 15 Cl. Ct. 100, 105 (1988); see also Campbell v. United States, 2 Cl. Ct. 247, 249 (1983).

4. Agency Action In Response to GAO Recommendation

(1) Where an agency follows a GAO recommendation, even if the GAO recommendation is different from the initial decision of the contracting officer, the agency's decision shall be deemed "proper unless the [GAO's] decision was itself irrational." Honeywell, Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989); see also The Centech Group, Inc. v. Untied States, 554 F.3d 1029, 1039 (Fed. Cir. 2009).

(2) The Court will only "inquire whether the GAO decision was rational and the agency justifiably relied upon it." SP Sys., Inc. v. United States, 86 Fed. Cl. 1, 13 (2009) (citing Honeywell, Inc. v. United States, 870 F.2d 644, 647 (Fed. Cir. 1989).

(3) GAO decisions are "traditionally treated with a high degree of deference, especially in bid protest actions." Grunley Walsh Int'l LLC v. United States, 78 Fed. Cl. 35, 39 (2007) (citations omitted).

Even upon the demonstration of a significant error, a protester must still establish that it was prejudiced and that, but for the error, there was a substantial chance that it would have received the award. Alfa Laval Separation, Inc. v. United States, 175 F.3d 1365, 1367 (Fed. Cir. 1999) (citing Statistica, Inc. v. Christopher, 102 F.3d 1577, 1582 (Fed. Cir. 1996)).

C. Standard for injunctive relief.

1. Four elements:

a. Plaintiff is likely to succeed on the merits;

b. Plaintiff will suffer irreparable harm;

c. Plaintiff's harm outweighs the harm to the government; and

d. Public interest favors equitable relief.

2. Only difference in a preliminary and permanent injunction is a plaintiff must show likelihood of success on merits for a preliminary injunction and actual success on the merits for a permanent injunction.

3. In a recent case, Monsanto Co. v. Geertson Seed Farms, 130 S.Ct. 2743 (2010), the Supreme Court held that the "drastic and extraordinary remedy" of injunctive relief should not be "granted as a matter of course." Id. at 2761. Importantly, the Supreme Court further held "is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test[.]" Id.

D. The Administrative Record.

1. What is included:

(1) Appendix C, RCFC, contains the Court's procedures in bid protest proceedings. Paragraph VII of Appendix C provides a fairly comprehensive list of the information that should be included in the record.

Practice tip: Be familiar with the requirements of Appendix C. As soon as you *think* a procurement may result in a COFC protest, begin to compile the material listed in Appendix C for inclusion in the administrative record. The agency is responsible for organizing the documents and providing an index.

(2) The agency should compile the full administrative record that was before it at the time it made the decision under review. James Madison Ltd. v. Ludwig, 82 F.3d 1085, 1095 (D.C. Cir. 1996).

(3) The Court should generally have before it the same information that was before the agency when it made its decision. Mike Hooks, Inc. v. United States, 39 Fed. Cl.

147, 154 (1997).

(4) Thus, the administrative record should consist of the material that the agency developed and considered, directly or indirectly, in making the challenged decision. Bar MK Ranches v. Yuetter, 994 F.2d 735, 739 (10th Cir. 1993); Ad Hoc Metals Coal. v. Whitman, 227 F. Supp. 2d 134, 139 (D.D.C. 2002); Nat'l Ass'n of Chain Drug Stores v. U.S. Dep't of Health & Human Servs., 631 F. Supp. 2d 23, 26 (D.D.C. 2009) (citing Pac. Shores Subdiv., Cal. Water Dist. v. U. S. Army Corps of Eng'rs, 448 F. Supp. 2d 1, 4 (D.D.C. 2006)); Tafas v. Dudas, 530 F. Supp. 2d 786, 793 (E.D. Va. 2008).

(5) The agency should include all materials that might have influenced its decision, not just the documents upon which it relied. Ad Hoc Metals Coal. v. Whitman, 227 F. Supp. 2d 134, 139 (D.D.C. 2002) (include materials considered or relied upon); Ctr. for Native Ecosystems v. Salazar, 711 F. Supp. 2d 1267, 1275-76 (D. Colo. 2010) (If decision based upon the work of subordinates, include the materials considered by the subordinates).

(6) GAO proceedings – Appendix C ¶ 22 of the Rules of the Court of Federal Claims enlarges the usual scope of an administrative record by including the entire record of a timely protest with the GAO, pursuant to the Competition in Contracting Act, 31 U.S.C. § 3553(d)(3). This can include, among other things, post hoc testimony and evidence.

(7) An agency may not exclude from the administrative record documents that reflect pertinent but unfavorable information. Blue Ocean Inst. v. Gutierrez, 503 F. Supp. 2d 366, 369 (D.D.C. 2007).

However, the administrative need not include underlying source documents that were not themselves considered by the agency. Sequoia Forestkeeper v. U. S. Forest Serv., No. 09-392, 2010 WL 2464857, at *6 (E.D. Cal. June 12, 2010).

2. What is NOT included:

a. The administrative record does not include privileged materials, such as documents that fall within the deliberative process privilege, attorney-client privilege, and work product privilege. Town of Norfolk v. U.S. Army Corps of Eng'rs, 968 F.2d 1438, 1457-58 (1st Cir. 1992); Ad Hoc Metals Coal. v. Whitman, 227 F. Supp. 2d 134, 143 (D.D.C. 2002) ("Judicial review of agency action should be based on an agency's stated justifications, not the predecisional process that led up to the final, articulated decision.").

b. The general rule is that these documents are not logged as withheld because they are not part of the administrative record. Amfac Resorts LLC v. Dept. of Interior, 143 F. Supp. 2d 7, 13 (D.D.C. 2001) ("deliberative intra-agency memoranda and other such records are ordinarily privileged, and need not be included in the record"); New York v. Salazar, 701 F. Supp. 2d 224, 236 (N.D.N.Y. 2010) ("as a matter of law, privileged documents are not part of the administrative record"); Blue Ocean Inst. v. Gutierrez, 503 F. Supp. 2d 366, 369 (D.D.C. 2007); but see *Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1275-76, n.10 (D. Colo. 2010) (requiring privilege log); Miami Nation of Indians of Ind. v. Babbitt, 979 F. Supp. 771, 778 (N.D. Ind. 1996) (requiring the Government to seek a protective order to assert deliberative process privilege).

c. **Internal memoranda** (*e.g.*, e-mail messages and draft documents) made during the **decisional process** are not included in a record. Norris & Hirshberg, Inc. v. SEC, 163 F.2d 689, 693 (D.C. Cir. 1947); see San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26, 45 (D.C. Cir.) (en banc) ("We think the analogy to the deliberative processes of a court is an apt one. Without the assurance of secrecy, the court could not fully perform its functions."), cert. denied, 479 U.S. 923 (1986). There are exceptions to this rule. New York v. Salazar, 701 F. Supp. 2d 224, 238 (N.D.N.Y. 2010) (where decision-making process is itself the subject of the litigation); In re Subpoena Duces Tecum Served on the Office of the Comptroller, 156 F.3d 1279, 1280 (D.C. Cir. 1998); see also National Courier Ass'n v. Bd. of Governors, 516 F.2d 1229, 1242 (D.C. Cir. 1975).

d. EXCEPTION: Internal and deliberative memoranda may be required in an administrative record where a protestor makes an initial showing to support an allegation of bad

faith; i.e., when the Court has determined the plaintiff has made a well-grounded attack upon the decision-making process itself.

3. Supplementation

(1) Definitions.

1. Supplement. A protester seeks to supplement, or go beyond, the record when the protester moves to include material in the administrative record that was not before the decision maker, *i.e.*, material that does not belong in the record. Supplementing the administrative record with extra-record evidence is different from correcting or completing the administrative record.

2. Correct or Amend. A protester seeks to complete, or correct, the record when the protester moves to include in the administrative record material that *should have been* included, but was nonetheless inadvertently omitted.

b. General Rule. Courts generally deny requests to supplement the administrative record.

(1) Supplementation is not permitted because extra-record or ex-post facts and opinions simply are not relevant to the Court's inquiry. See, e.g., Emerald Coast Finest Produce, Inc. v. United States, 76 Fed. Cl. 445, 448-49 (2007) (refusing to add to the record declarations not considered by the agency when making its award decision); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (court considers only those materials that were "before the decision-making authority at the time of its decision."); Axiom Resource Management, Inc. v. United States, 564 F.3d 1374, 1379 (2009) (judicial review is generally limited to "the administrative record already in existence, not some new record made initially in the reviewing court"); L-3 Communications EOTech, Inc. v. United States, 87 Fed. Cl. 656, 672 (2009) (no "unfettered right to submit declarations giving its commentary on every aspect of the … process, and to have those declarations included in the administrative record[.]").

(2) Supplementing the administrative record is "an unusual

action that is rarely appropriate." Weiss v. Kempthorne, No. 08-1031, 2009 WL 2095997, at *3 (W.D. Mich. July 13, 2009); Am. Wildlands v. Kempthorne, 530 F.3d 991, 1002 (D.C. Cir. 2008); Medina Co. Envtl. Action Ass'n v. Surface Transp. Bd., 602 F.3d 687, 706 (5th Cir. 2010).

c. Supplementation Post-Axiom:

(1) In Axiom, CAFC reiterated the restrictive approach to supplementing the administrative record.[2]

(2) Supplementation of the administrative record is **available only** when "the omission of extra-record evidence precludes **effective judicial review**." Axiom, 564 F.3d at 1379; see also Murakami v. United States, 46 Fed. Cl. 731, 735 (2000), aff'd, 398 F.3d 1342 (Fed. Cir. 2005) ("exceptions to the general rule against extra-record evidence are based on necessity, rather than convenience, and should be triggered only where the omission of extra-record evidence precludes effective judicial review.")

(3) Allowing supplementation of the record, without first evaluating whether the record is sufficient to permit meaningful review is an abuse of discretion. Axiom, 564 F.3d at 1380 ("the trial court abused its discretion in this case" by failing "to make the required threshold determination of whether additional evidence was necessary.")

(4) Therefore, before any supplementation is allowed, the Court first makes a threshold determination of "whether supplementation of the record [is] necessary in order not 'to frustrate effective judicial review.'" Axiom, 564 F.3d at 1379 (quoting Camp v. Pitts, 411 U.S. 138, 142-43 (1973)).

E. What to Expect After Protest Is Filed.

[2] Before Axiom, this court "frequently . . . adopted and applied [eight] exceptions to the review of outside evidence" based on the District of Columbia Circuit's decision in Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989). Protection Strategies, Inc. v. United States, 76 Fed. Cl. 225, 234 (2007). In Axiom, the Federal Circuit repudiated the Esch factors and described a far more restrictive approach to supplementation. 564 F.3d at 1380.

1. Process starts with 24 hour advance notice filed by plaintiff.

    a. Appendix C, ¶ 3, RCFC, requires plaintiff to file a 24-hour notice with our office that identifies the procuring agency, contact information for the contracting officer and agency counsel, whether plaintiff is seeking a TRO or preliminary injunction ("TRO/PI"), whether plaintiff has discussed the TRO/PI with our office, whether there was a GAO protest, and whether a protective order will be needed.

    b. Failure to file 24-hour notice is not a jurisdictional defect.

2. Upon receipt of the 24-hour notice, the case is assigned to a DOJ trial attorney, who will contact the contracting officer and agency counsel directly prior to filing a notice of appearance ("NOA") with COFC.

3. This is time-sensitive matter and COFC will act with a sense of urgency and hold a scheduling teleconference for either the same day or the day after the NOA is filed.

    a. Agency counsel and, in some cases, the contracting officer, should expect to participate in the initial teleconference.

    b. Court typically concerned with:

        (1) Addressing TRO/PI if raised by plaintiff (will agency voluntarily stay proceedings?);

        (2) Status of the procurement (pre or post award?);

        (3) Determining if there will be an intervenor;

        (4) Setting a briefing schedule, which includes filing of the administrative record; and

        (5) Did protester initially file at the GAO?

        Practice Tip: If there was a GAO protest, please send the legal memorandum and contracting officer statement directly to the assigned trial attorney as soon as possible to expedite the learning curve.

F. Protective Orders:

1. Order limiting the disclosure of source selection, proprietary, and other protected information to those persons admitted to that order. The order also governs how such information is to be identified and disposed of when the case is over. The COFC regularly issues these orders, although in at least one case, the COFC denied the request of the government and the apparent awardee to issue a protective order and ordered the release of the government's evaluation documentation relating to the protester's proposal to the protester. See Pike's Peak Family Housing, Inc. v. United States, 40 Fed. Cl. 673 (1998).

2. Once the order is issued, one gets admitted to the order by submitting an appropriate application. Form 8 of the RCFC Appendix contains a model protective order and Form 9 of the RCFC Appendix is a model application for access by outside counsel, inside counsel, and outside experts.

3. Ordinarily, objections must be made within 2 business days of receipt of a given application. If no objections are made within 2 business days, the applicant is automatically admitted to the protective order.

4. COFC, DOJ, and agency personnel are automatically admitted.

5. Most judges request or accept proposed redactions from court orders and opinions and decide what protected information to redact. See, e.g., WinStar Communications, Inc. v. United States, 41 Fed. Cl. 748, 750 n.1 (1998). Recently, COFC has scrutinized proposed redactions closely. See, e.g., Akal Sec., Inc. v. United States, 87 Fed. Cl. 311, 314 n.1 (2009).

XIV. THE CONTRACT DISPUTES ACT OF 1978. 41 U.S.C. §§ 7101-7109.

A. Applicability.

1. 41 U.S.C. § 7102.

2. The CDA applies to all express or implied contracts an executive agency enters into for:

   a. The procurement of property, other than real property in being;

   b. The procurement of services;

   c. The procurement of construction, alteration, repair or maintenance of real property; or

d. The disposal of personal property.

3. It has been the law that the CDA does not normally apply to contracts funded solely with nonappropriated funds (NAFs), with the exception of contracts with the exchanges listed in the Tucker Act. 41 U.S.C. § 7102(a); 28 U.S.C. 1491(a)(1). Recently, however, the Federal Circuit has held, en banc, that Tucker Act jurisdiction encompasses NAFs. See Slattery v. United States, 635 F.3d 1298 (2011).

B. Jurisdictional prerequisites:

1. Contractor has submitted a proper claim to the contracting officer, or

2. The Government has submitted a proper claim (e.g., termination, LDs, demand for money).

3. The contracting officer has issued a final decision, or is deemed by inaction to have denied the claim. Tri-Central, Inc. v. United States, 230 Ct. Cl. 842, 845 (1982); Paragon Energy Corp. v. United States, 227 Ct. Cl. 176 (1981).

4. The COFC considers the case de novo. 41 U.S.C. § 7104(b)(4). A contracting officer's findings are not binding on the Court, or the Government, nor are omissions by the contracting officer. Wilner v. United States, 24 F.3d 1397, 1401 (Fed. Cir.1994). Thus, so long as the information was available to the Government, the COFC may consider it in reviewing the contracting officer's decision. For example, a termination for default may be sustained at the COFC upon any ground existing at the time of termination, even one not then known to the contracting officer. See Empire Energy Mgmt. Sys., Inc. v. Roche, 362 F.3d 1343, 1357 (Fed. Cir.2004).

5. The CDA is a waiver of sovereign immunity for the payment of interest. Interest accrues from the date the contracting officer receives the claim until the contractor receives its money.

6. Not limited to monetary damages.

a. COFC possesses jurisdiction to render judgments in "a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued" pursuant to the CDA. 28 U.S.C.A. § 1491(a).

b. In recent years, COFC has used this authority to review questions of contract administration, such as performance evaluations. See Todd Const. L.P. v. United States, 85 Fed. Cl. 34 (2008), 94 Fed. Cl. 100 (2010); BLR Group of America, Inc. v. United States, 84 Fed. Cl. 634 (2008).

7. Subcontractors:

a. Generally cannot directly bring a CDA challenge, because there is no privity of contract with the United States, unless the prime contractor is a "mere government agent." United States v. Johnson Controls, Inc., 713 F.2d 1541, 1550-51 (Fed. Cir. 1983).

b. While subcontractors that were third-party beneficiaries of the contract between the Government and the prime contractor cannot proceed under the CDA, they may bring a similar claim in COFC under the Tucker Act. Winter v. FloorPro, Inc., 570 F.3d 1367 (Fed. Cir. 2009). See FloorPro, Inc. v. United States, ___ Fed. Cl. ___, 2011 WL 1289061 (2011).

Sureties: CDA or Equitable Subrogation. National Surety v. United States, 118 F.3d 1543 (Fed. Cir. 1997); Fireman's Fund Ins. Co. v. United States, 909 F.2d 495 (Fed. Cir. 1990).

C. Statute of Limitations.

1. For contracts awarded on or after October 1, 1995, a contractor must submit its claim within six years of the date the claim accrues. 41 U.S.C. § 605(a)). This statute of limitations provision does not apply to Government claims based on contractor claims involving fraud.

2. Complaint filing. The contractor must file its complaint in the COFC within 12 months of the date it received the contracting officer's final decision. 41 U.S.C. § 7104(b)(3). See Borough of Alpine v. United States, 923 F.2d 170 (Fed. Cir. 1991).

3. Reconsideration by the Contracting Officer. A timely request made to the contracting officer for reconsideration of a decision, that results in an actual reconsideration, suspends the "finality" of the decision, and provides a new statute of limitations period. See Bookman v. United States, 197 Ct. Cl. 108, 112 (1972).

4. "Deemed Denied." No statute of limitations?

a. Under the CDA, upon receipt of a written claim from a contractor, a contracting officer must issue a final decision within sixty days. 41 U.S.C. § 605(c)(1), (2). If the Contracting Officer fails to issue a decision within the requisite time period, the claim may be deemed denied. 41 U.S.C. § 605(c)(5).

b. If no decision is issued, the Court of Federal Claims has held that CDA's one-year statute of limitations does not begin to run and the Tucker Act's six year statute of limitations does not apply, because the claim remains a CDA claim. See Environmental Safety Consultants, Inc. v. United States, 95 Fed. Cl. 77 (2010); System Planning v. United States, 95 Fed. Cl. 1 (2010).

D. Consolidation of Suits.

If two or more actions arising from one contract are filed in COFC and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, COFC may order the consolidation of the actions in that court or transfer any actions to or among the agency boards involved. 41 U.S.C. § 7107(d).

E. Relationship Between COFC and the Boards

1. 41 U.S.C. §§ 7104(a),(b)(1).

2. The CDA provides alternative forums for challenging a contracting officer's final decision.

3. Once a contractor files its appeal with a particular forum, this election is normally binding and the contractor may no longer pursue its claim in the other forum. See Bonneville Assocs. v. United States, 43 F.3d 649 (Fed. Cir. 1994) (dismissing the contractor's suit because the contractor originally elected to proceed before the GSBCA); see also Bonneville Assocs. v. General Servs. Admin., GSBCA No. 13134, 96-1 BCA ¶ 28,122 (refusing to reinstate the contractor's appeal), aff'd, Bonneville Assoc. v. United States, 165 F.3d 1360 (Fed. Cir. 1999).

4. The "election doctrine" does not apply if the forum originally selected lacked subject matter jurisdiction over the appeal. See Information Sys. & Networks Corp. v. United States, 17 Cl. Ct. 527 (1989) (holding that the

contractor's untimely appeal to the Agriculture Board of Contract Appeals did not preclude it from pursing a timely suit in the Claims Court).

5. Decisions of the boards of contract appeals are not binding upon the COFC. See General Electric Co., Aerospace Group v. United States, 929 F.2d 679, 682 (Fed. Cir. 1991).

XV. CONCLUSION.

FEDERAL LITIGATION COURSE

CHAPTER H

FEDERAL TORT CLAIMS ACT

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II. INTRODUCTION

A. History and Purpose of the FTCA.

1. Before passage of the FTCA in 1946, the United States was immune from suit.

2. Redress for injuries caused by Government employees was available only through private relief bills.

3. The FTCA was enacted to:

a. Provide a remedy for injuries caused by Government negligence; and

b. Relieve Congress of the burden of handling private relief bills.

B. General Features of the FTCA.

1. The FTCA permits recovery for personal injury, death, or property damage caused by Government employees acting within the course and scope of employment. 28 U.S.C. § 1346(b).

2. The law of the state where the act or omission occurred determines the liability of the United States. 28 U.S.C. § 2672.

3. Limited waiver of sovereign immunity.

a. Claimants must submit an administrative claim to the appropriate Government agency for adjudication before filing suit in Federal court. 28 U.S.C. § 2675(a).

b. The FTCA has its own statute of limitations.

(1) The claim must be submitted to the appropriate Government agency within two years of accrual. 28 U.S.C. § 2401(b).

(2) The claimant must file a complaint in Federal court within six months of the agency's denial of the claim. 28 U.S.C. §§ 2401(b), 2675(a).

(3) No period of limitation applies to a plaintiff if the agency fails to act within six months after receiving the plaintiff's claim. Pascale v. United States, 998 F.2d 186 (3rd Cir. 1993).

c. Suit cannot be brought for an amount greater than that submitted in the administrative claim unless the claimant provides proof of:

(1) Newly discovered evidence not reasonably discoverable at the time of presenting the claim to the agency; or

(2) Intervening facts relating to the amount claimed. 28 U.S.C. § 2675(b).

d. Plaintiffs may sue for negligence, but not, in most cases, for intentional torts. 28 U.S.C. § 2680.

e. Congress has precluded the recovery of punitive damages and prejudgment interest. 28 U.S.C. § 2674.

f. Trial is by Federal judge without a jury. 28 U.S.C. § 2402.

g. Venue is appropriate only in the district where the plaintiff resides or where the act or omission occurred. 28 U.S.C. § 1402(b).

h. Attorney fees are limited to 20% of an administrative settlement and 25% of a judgment or compromise settlement. 28 U.S.C. § 2678.

III. FTCA METHOD OF ANALYSIS.

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IV. ADMINISTRATIVE PREREQUISITES TO SUIT.

A. Has the Claimant Filed a Proper Administrative Claim?

1. Written Notice and a Sum-Certain.

a. The claimant must make a written demand that provides sufficient notice to the agency to allow it to investigate. There is a split of authority among courts regarding the scope of the jurisdictional prerequisites necessary to hear claims brought pursuant to the FTCA. The majority of courts have held that a plaintiff must give the applicable agency "minimal notice," which includes (1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum-certain damages claim. See, e.g., GAF Corp. v. United States, 818 F.2d 901, 919 (D.C.Cir.1987). A minority of courts have imposed a more stringent standard, holding that a plaintiff must comply with each of the regulatory requirements found in 28 C.F.R. § 14.2, which include evidence of "the title or legal capacity of the person signing ... accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative." See, e.g., Kanar v. United States, 118 F.3d 527, 528-29 (7th Cir.1997). The majority position has been adopted in the Ninth Circuit, see Warren v. United States Dep't of Interior Bureau of Land Mgmt., 724 F.2d 776, 780 (9th Cir.1984) (en banc), the Third Circuit, see Tucker v. United States Postal Serv., 676 F.2d 954, 959 (3d Cir.1982), the Fifth Circuit, see Adams v. United States, 615 F.2d 284, 289 (5th Cir.) clarified, reh'g denied, 622 F.2d 197 (5th Cir.1980), the Sixth Circuit, see Douglas v. United States, 658 F.2d 445, 447 (6th Cir.1981), and the Eleventh Circuit, see Bush v. United States, 703 F.2d 491, 494 (11th Cir.1983). The Eighth Circuit Eighth Circuit is commonly cited in other circuits as an example of a court having adopted the minority position.(see, e.g., Kanar, 118 F.3d at 529), but its status is in question. See, Mader v. United States, 619 F.3d 996, 999 (8th Cir. 2010), reh'g en banc granted, (Dec. 14, 2010).

b. Suit may be brought only on those facts and theories of liability raised by the administrative claim. Bembinista v. United States, 866 F.2d 493 (D.C. Cir. 1989).

c. The written claim must demand a sum certain in money. Gonzalez v. United States, 284 F.3d 281, 287 (1st Cir.2002); (Failure to specify a sum certain is a defect that deprives the court of subject matter jurisdiction over the action); Dalrymple v. United States, 460 F.3d 1318, 1324 (11th Cir. 2006); Suarez v. United States, 22 F.3d 1064 (11th Cir. 1994) ; Kokaras v. United States, 980 F.2d 20 (1st Cir. 1992), cert. denied, 501 U. S.819 (1993); Bradley v. United States Veterans' Administration, 951 F.2d 268 (10th Cir. 1991); Burns v. United States, 764 F.2d 722 (9th Cir. 1985).

d. Claims asking for an approximate number of dollars (e.g., "approximately $1,000,000") have been considered sufficient, but the recovery has been limited to the stated amount. Corte-Real v. United States, 949 F.2d 484 (1st Cir. 1991).

e. Suit cannot be brought for an amount greater than that submitted in the administrative claim unless the claimant provides proof of (1) newly discovered evidence not reasonably discoverable at the time of presenting the claim to the agency, or (2) intervening facts relating to the amount of the claim. Low v. United States, 795 F.2d 466 (5th Cir. 1986). See also, Dickerson ex rel. Dickerson v. United States, 280 F.3d 470 (5th Cir. 2002); Reilly v. United States, 863 F.2d 149, 173 (1st Cir. 1988).

2. Signed by the Claimant.

a. The claimant or the claimant's representative must sign the written notice demanding a sum certain.

b. Proof of agent signatory authority may or may not be required. See Conn v. United States, 867 F.2d 916 (6th Cir. 1989) (No); Department of Justice Regulations, 28 C.F.R. Part 14 (Yes).

c. If a derivative claim is intended to be presented, a separate, signed claim must be received. Manko v. United States, 830 F.2d 831, 840 (8th Cir. 1987); Rucker v. Department of Labor, 798 F.2d 891 (6th Cir. 1986); contra, Avila v. Immigration and Naturalization Service, 731 F.2d 616 (9th Cir. 1984) (holding untimely amendment "related back" because father's name on original claim for incompetent son put government on notice of father as potential additional claimant).

d. Similarly, reference in a claim to injuries suffered by other persons does not suffice as a claim on behalf of any person other than the signatory. Montoya v. United States, 841 F.2d 102 (5th Cir. 1988).

3. Submitted to the Appropriate Federal Agency.

a. The written notice demanding a sum certain and signed by the claimant or his authorized representative must be submitted to the appropriate agency.

b. An SF-95 is the standard form on which claims are usually submitted; however there is no legal requirement that the form be used. A claim is still valid provided that it is in writing, demands a sum certain, is signed by the claimant or his authorized representative, and is submitted to the appropriate agency.

c. The "appropriate agency" is the Federal agency whose activities gave rise to the claim.

d. If a claim is submitted to the wrong agency, the Attorney General's regulations require the receiving agency to transfer the claim to the appropriate agency and to notify the claimant of the transfer. 28 C.F.R. § 14.2(b)(1).

e. The failure of an agency to "transfer . . . [a claim] forthwith to the appropriate agency" may, in effect, extend the statute of limitations or excuse presentment to the "appropriate agency." Bukala v. United States, 854 F.2d 201 (7th Cir. 1988); see also, Hart v. Dep't of Labor ex rel. U.S., 116 F.3d 1338, 1341 (10th Cir. 1997 (holding that "if the agency fails promptly to comply with the transfer regulation and, as a result, a timely filed, but misdirected claim does not reach the proper agency within the limitations period, the claim may be considered timely filed.")

B. Has the Claimant Complied with the Statute of Limitations?

1. The purpose of the FTCA's statute of limitations is to require the reasonably diligent presentation of tort claims against the government. Ryan v. United States, 534 F.3d 828 (8th Cir. 2008) (Involving twins switched at birth).

2. The written notice demanding a sum certain signed by the claimant or the claimant's representative must be presented to the appropriate Federal agency within two years of when the claim first accrued. Roman-Cancel v. United States, 613 F.3d 37, 42 (1st Cir. 2010) (compliance with the FTCA's temporal deadlines is both mandatory and jurisdictional).

3. 28 U.S.C. § 2401(b) provides:

> "*A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.*"

4. The statute of limitations is an affirmative defense. Schmidt v United States, 933 F2d 639, 640 (8th Cir. 1991) (citing Rule 8(c), Fed R Civ P).

5. When does a claim "accrue"?

a. Normally, in a tort cause of action, accrual occurs at the time of injury, loss, or damage.

b. Federal, not state, law determines accrual. Vega-Velez v United States, 800 F2d 288(1st Cir. 1986); Johnson v. Smithsonian Inst., 189 F.3d 180 (2d Cir. 1999); Miller v. Philadelphia Geriatric Center, 463 F.3d 266 (3d Cir. 2006); Goodhand v United States, 40 F.3d 209 (7th Cir. 1994); Radman v United States, 752 F2d 343 (8th Cir. 1985); Motley v. United States, 295 F.3d 820 (8th Cir. 2002).

c. Discovery Rule: In medical malpractice cases under the FTCA, the Supreme Court has held that a claim accrues when the claimant knew or should have known of the injury and the cause of the injury. United States v. Kubrick, 444 U.S. 111 (1979).

d. The *Kubrick* accrual standard is an objective test. The claim "accrues" and the statute begins to run "when the facts would lead a reasonable person (a) to conclude that there was a causal connection between the treatment and injury, or (b) to seek professional advice, and then with that advice, to conclude that there was a causal connection between the treatment and injury." MacMillan v. United States, 46 F.3d 377 (5th Cir. 1995). See also, Johnson v. United States, 460 F.3d 616, 622 (5th Cir. 2006) ("MacMillan imposed a duty to seek advice once this probable cause was revealed to the plaintiff by the doctor.")

e. Under *Kubrick*, the courts differ on what "cause" the plaintiff must know to start the statute of limitations running.

(1) Some courts of appeal have held that knowledge of the "physical cause" of the injury is sufficient to start the statute of limitations running.

(a) Sexton v. United States, 832 F.2d 629, 633 (D.C. Cir. 1987) (Under the FTCA, a claim accrues when the plaintiff "has discovered both his injury and its cause," regardless of whether the plaintiff knows the injury was negligently inflicted.) (quoted in Webb v. United States, 535 F. Supp. 2d 54, 58 (D.D.C. 2008));

(b) Zeleznik v. United States, 770 F.2d 20, 23 (3d Cir.), cert. denied, 475 U.S. 1108 (1986). ("We agree with those Courts of Appeals that have held that a claim accrues when the injured party learns of the injury and its immediate cause. The rationale of the discovery rule as announced in *Kubrick* is that the statute of limitations begins to run on the first date that the injured party possesses sufficient critical facts to put him on notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress.")

(c) Gould v. United States Dept. of HHS, 905 F.2d 738 (4th Cir. 1990), cert. denied, 498 U.S. 1025 (1991) (holding that a cause of action accrues when plaintiffs learned both of the existence and cause of the injury, not when plaintiffs also learned the legal identity of the alleged tort-feasors as federal employees).

(d) Dyniewicz v. United States, 742 F.2d 484, 486 (9th Cir.1984) ("Discovery of the cause of one's injury, however, does not mean knowing who is responsible for it. The 'cause' is known when the immediate physical cause of the injury is discovered.")

(e) "[A] medical malpractice claim under the FTCA accrues when the plaintiff is, or in the exercise of reasonable diligence should be, aware of both [his] injury and its connection with some act of the defendant." McCullough v. United States, 607 F.3d 1355, 1359 (11th Cir.2010) (quoting Price v. United States, 775 F.2d 1491, 1494 (11th Cir.1985)).

(2) Other courts have held that the statute of limitations does not begin to run until the plaintiff knows or should know of the Government's role in causing the injury.

(a) Rakes v. United States, 442 F.3d 7, 19-20 (1st Cir. 2006) ("a claim does not accrue under the FTCA until a person in the plaintiff's position, that is, one who knew or should have known as much as the plaintiff knew or should have known, would believe that he had been injured and would know 'sufficient facts to permit a reasonable person to believe that there is a causal connection between the government and [the] injury.'") (quoting Skwira v. United States, 344 F.3d 64, 78 (1st Cir. 2003)).

(b) Nemmers v. United States, 870 F.2d 426, 631 (7th Cir. 1989). (under Kubrick, the proper test for determining when the statute of limitations begins to run on a plaintiff's claim is the objective test of whether, on the basis of professional advice, a reasonable person in the plaintiff's position would have known enough to identify negligent treatment).

(c) Drazan v. United States, 762 F.2d 56 (7th Cir. 1985) ("When there are two causes of an injury, and only one is the government, the knowledge that is required to set the statute of limitations running is knowledge of the government cause, not just of the other cause.").

(3) Some courts have applied the Kubrick discovery rule in circumstances in which the injury, its cause, or both are latent. Donahue v. United States, 634 F.3d 615, 623 (1st Cir. 2011); Plaza Speedway Inc. v. United States, 311 F.3d 1262, 1270–71 (10th Cir.2002); Garza v. U.S. Bureau of Prisons, 284 F.3d 930, 934–35 (8th Cir.2002); Díaz v. United States, 165 F.3d 1337, 1339 (11th Cir.1999); Kronisch v. United States, 150 F.3d 112, 121 (2d Cir.1998).

6. Tolling the statute of limitations.

a. Equitable Tolling - Historical Background.

(1) The statute of limitations was considered one of the conditions placed upon the waiver of sovereign immunity.

(2) Equitable considerations, estoppel, and waiver did not generally affect the running of the limitations period.

(3) In 1990, however, the Supreme Court abandoned the jurisdictional rationale supporting statutes of limitation in favor of the United States. Irwin v. Veterans' Admin., 498 U.S. 89 (1990) (holding in a Title VII case that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States).

b. Equitable tolling applies in limited circumstances against the United States under the FTCA. Gonzalez v. United States, 284 F.3d 281, 291, (1st Cir. 2002) ("The doctrine of equitable tolling suspends the running of the statute of limitations if a plaintiff, in the exercise of reasonable diligence, could not have discovered information essential to the suit."); Valdez ex rel. Donely v. United States, 518 F.3d 173, 182 (2d Cir. 2008)(Equitable tolling permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information concerning his claim's existence.); Lambert v. United States, 44 F.3d 296, 299 (5th Cir. 1995) (holding that equitable tolling will not apply when the plaintiff has an adequate remedy to avoid the statute of limitations or has failed to act diligently).

c. Neither infancy nor incompetence will postpone the accrual of a claim. Leonhard v. United States, 633 F.2d 599, 624 (2d Cir. 1980), cert. denied, 451 U.S. 908 (1981) ("It is firmly established that the two-year period is not tolled by a claimant's minority."); see also Kach v. Hose, 589 F.3d 626, 637 (3d Cir. 2009); Barren v. United States, 839 F.2d 987 (3d Cir.), cert. denied, 488 U.S. 827 (1988) (incompetence will not postpone accrual). See also Patterson v. United States, 451 F.3d 268 (1st Cir. 2006) (discussing infancy and incompetence in FTCA cases).

d. The Servicemembers Civil Relief Act (formerly Soldiers' and Sailors' Civil Relief Act) will toll the claims of service members regardless of whether their ability to pursue the claim has been impaired by military service. Kerstetter v. United States, 57 F.3d 362, 369 (4th Cir. 1995); Mason v. Texaco, Inc., 862 F.2d 242 (10th Cir. 1988) cert. denied, 504 U.S. 910 (1992).

7. The second prong of the statute of limitations requires timely filing of a lawsuit after the agency has finally denied the claim.

a. After filing the administrative claim, a claimant cannot file suit until the agency has had the claim for six months. The court lacks subject matter jurisdiction if the complaint is filed within six months of the submission of the claim and before the agency makes a final denial. 28 U.S.C. § 2401(b); 28 C.F.R. § 14.9(b); McNeil v. United States, 508 U.S. 106 (1993).

b. After six months of receipt of the claim, if the agency has not settled or denied it, the claimant may deem the claim denied and file suit in Federal court. 28 U.S.C. § 2675(a). The six-month limitation period does not begin to run until the agency has denied the claim. Life Partners Inc. v. United States, No. 10-50354, 2011 WL 3572003 (5th Cir. Aug. 16, 2011); Parker v. United States, 935 F.2d 176 (9th Cir. 1991).

c. If the agency notifies the claimant by certified or registered mail of its decision to deny the claim, the claimant must file suit within six months of the date of mailing of the letter, or the action will be forever barred. 28 U.S.C. § 2401(b); 28 C.F.R. § 14.9(b); Lambert v. United States, 44 F.3d 296 (5th Cir. 1995); Parker v. United States, 935 F.2d 176 (9th Cir. 1991).

C. Is the Person Filing a Proper Claimant?

1. Proper Claimants.

a. Claims for personal injury or for damage to or loss of property may be presented by the injured person or property owner or their authorized agent or representative. 28 C.F.R. § 14.3(a) and (b).

b. Wrongful death claims may be presented by the executor or administrator of the decedent's estate, or by any other person legally entitled to assert a claim under applicable state law. 28 C.F.R. § 14.3(c); Knapp v. United States, 844 F.2d 376 (6th Cir. 1988); Free v. United States, 885 F.2d 840 (11th Cir. 1989).

c. A claim for loss wholly compensated by an insurer with the rights of a subrogee may be presented by the insurer. A claim for loss partially compensated by an insurer with the rights of a subrogee may be presented by the parties individually as their respective interests appear, or jointly. 28 C.F.R. § 14.3(d).

2. Improper Claimants.

a. Certain categories of claimants are precluded from recovering under the FTCA for injuries sustained under certain circumstances.

b. Federal civilian employees.

(1) The exclusive remedy for Federal civilian employees injured during their employment is the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8116(c). Eubank v. Kansas City Power & Light Co., 626 F.3d 424, 427 (8th Cir. 2010)

(2) "FECA's exclusive liability provision ... was designed to protect the Government from suits under statutes, such as the Federal Tort Claims Act, that had been enacted to waive the Government's sovereign immunity. In enacting this provision, Congress adopted the principal compromise-the "quid pro quo"-commonly found in workers' compensation legislation: employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue the Government." Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 193-94 (1983) (quoted in Mathirampuzha v. Potter, 548 F.3d 70, 80-81 (2d Cir. 2008)).

(3) If the claimant is a Federal employee and there is a "substantial question" whether FECA applies, the question must be resolved by the Secretary of Labor before the FTCA claim will be adjudicated. Figueroa v. United States, 7 F.3d 1405 (9th Cir. 1993), cert. denied, 511 U.S. 1030 (1994); Moe v. United States, 326 F.3d 1065, 1068 (9th Cir. 2003); Griffin v. United States, 703 F.2d 321 (8th Cir. 1983).

(a) The FTCA statute of limitations is not tolled while the Secretary of Labor considers the FECA question.

(b) Decisions by the Secretary of Labor as to whether FECA covers the alleged injury, or on the amount of compensation, if any, to be awarded, are final. Review of any kind by a court is absolutely barred. 5 U.S.C. § 8128(b). Tarver v. United States, 25 F.3d 900, 903 (10th Cir. 1994).

(4) FECA coverage extends to all injuries within the work "premises." Woodruff v. Dep't of Labor, 954 F.2d 634, 640 (11th Cir.), reh'g denied, 961 F.2d 224 (1992).

(5) Employees of nonappropriated funds are covered by the Longshoreman's and Harbor Worker's Compensation Act. 33 U.S.C. §§ 901-950, 8171.

c. Service members.

(1) Service members who are injured 'incident to service' cannot maintain an action against the United States under the FTCA. Feres v. United States, 340 U.S. 135 (1950).

(2) The rationales for the Feres doctrine are as follows:

(a) The relationship between the Government and members of its armed forces is "distinctively Federal in character" and should not be affected by state law;

(b) Congress already provides a system of compensation for injuries and/or death for members of the armed services; and,

(c) There would be an adverse impact upon discipline if Soldiers could sue for command decisions made and orders given in the course of duty. United States v. Brown, 348 U.S. 110 (1954).

(d) Finally, but most importantly, the Supreme Court has explained that "Feres and its progeny indicate that suits brought by service members against the Government for injuries incurred incident to service are barred by the Feres doctrine because they are the 'type[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'" Miller v. United States, 42 F.3d 297, 303 (5th Cir. 1995) (quoting United States v. Johnson, 481 U.S 681, 690 (1987)) (emphasis in original)); see also United States v. Shearer, 473 U.S. 52, 59 (1985)

(3) All rationales need not be presented for Feres to apply.

(4) "[W]hether or not the circumstances of a case implicate the rationales for the Feres doctrine, the doctrine bars any damage suit against the United States for injuries incurred incident to military service." Verma v. United States, 19 F.3d 646 (D.C. Cir. 1994) (*Feres* bars both personal injury and property damage claims).

(a) "In determining whether a particular claim is Feres barred, this court applies the three-part 'incident to service' test discussed in Verma v. United States, 19 F.3d 646, 648 (D.C.Cir.1994) (per curiam). We use three factors - the injured service member's duty status, the site of the injury and the nature of the activity engaged in by the service member at the time of his injury - to determine whether a member of the military may bring a claim against the government under the FTCA." Schnitzer v. Harvey, 389 F.3d 200, 203 (D.C. Cir. 2004) (quoting Verma, 19 F.3d at 646).

(b) This approach is consistent with other circuits. See, e.g., Richards v. United States, 176 F.3d 652, 655 (3rd Cir.1999); Speigner v. Alexander, 248 F.3d 1292, 1298 (11th Cir.2001); Kelly v. Panama Canal Comm'n, 26 F.3d 597, 600 (5th Cir. 1994).

(5) Factors for determining "incident to service." Courts typically consider several factors, with no one factor being dispositive.

(a) The first factor considered is the nature of the plaintiff's activity at the time of the injury. If the plaintiff was performing military duties or enjoying a privilege or benefit of military service at the time of the injury, the claim will usually be barred. United States v. Johnson, 481 U.S. 681 (1987); Coltrain v. United States, 999 F.2d 542 (9th Cir. 1993) (unpublished disposition).

(i) An injury to a service member on post or off post but while the service member is engaged in military duty is incident to service and Feres barred. Kohn v. United States, 680 F. 2d 922, 925 (2d Cir. 1982).

(ii) Claims for injuries incurred during medical treatment in a military medical treatment facility (MTF) are Feres barred. Jones v. United States, 112 F.3d 299 (7th Cir. 1997) (soldier's claim for improper surgery at Letterman AMC while he was at Olympic tryout is Feres barred); Hayes v. United States, 44 F.3d 377 (5th Cir. 1995), cert. denied, 516 U.S. 814 (1995) (finding death from medical malpractice during elective surgery is Feres barred); Alsip v. Ferrell, 39 F.3d 1191 (10th Cir. 1994) (unreported disposition) (medical treatment in MTF invokes Feres); Coltrain v. United States, 999 F.2d 542 (9th Cir. 1993) (unpublished disposition); Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987).

(iii) Claims for injuries incurred while using recreational equipment owned by the Government are usually barred. Bon v. United States, 802 F.2d 1092 (9th Cir. 1986) (MWR rental boat a benefit of service); Walls v. United States, 832 F.2d 93 (7th Cir. 1987); cf. Kelly v. Panama Canal Comm'n, 26 F.3d 597 (5th Cir. 1994), aff'd and reh'g denied, 66 F.3d 323 (1995) (unpublished disposition).

(iv) Claims for injuries incurred during transport as space available passengers are barred. Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979), cert. denied, 444 U.S. 1044 (1980).

(v) Claims for injuries caused in on post housing are generally barred. Feres, 340 U.S. 135 (1950) (soldier's suit for injuries as a result of a barracks fire is not cognizable); Preferred Insurance Co. v. United States, 222 F. 2d 942 (9th Cir.), cert. denied, 350 U.S. 837 (1955) (recovery denied for subrogation claims of insurance companies who paid for damage to mobile homes on military base); but see Elliot v. United States, 13 F.3d 1555 (11th Cir.), vacated, 28 F. 3d 1076, aff'd per curiam, 37 F.3d 617 (1994) (Soldier on leave in on post quarters not Feres barred for injuries incurred when heater in quarters malfunctioned).

(b) If the service member was not engaged in a military activity or enjoying a benefit of service at the time of his or her injury, courts usually consider the following factors together: plaintiff's location and duty status.

(i) Location.

(a) If the incident occurs off post while off duty, Feres generally will not bar the claim. Brooks v. United States, 337 U.S. 49 (1949) (on leave); Kelly v. Panama Canal Comm'n, 26 F.3d 597 (5th Cir. 1994), aff'd and reh'g denied, 66 F.3d 323 (1995) (unpublished disposition); Pierce v. United States, 813 F.2d 349 (11th Cir. 1987) (off-duty); Green v. Hall, 8 F.3d 695 (9th Cir. 1993), cert. denied, 513 U.S. 809 (1994).

(b) If off-duty but on the installation, Feres will bar the claim. Warner v. United States, 720 F.2d 837 (5th Cir. 1983) (service member was given the day off and was on personal business on post at the time of the injury); Flowers v. United States, 764 F.2d 759 (11th Cir. 1985); Shaw v. United States, 854 F.2d 360 (10th Cir. 1988); Morey v. United States, 903 F.2d 880 (1st Cir. 1990); McAllister v. United States, 942 F.2d 1473 (9th Cir. 1991), cert. denied, 502 U.S. 1092 (1992); Thompson v. United States, 8 F.3d 30 (9th Cir.), cert. denied, 510 U.S. 1191 (1994) (unpublished disposition).

(ii) Duty status.

(a) If service member is off duty (pass) or on chargeable leave, the majority of courts will look at the plaintiff's activity and location at the time of injuries to determine if they are incident to service and therefore Feres barred. (See analysis under "location" above).

(b) A minority view is that Feres will not bar the claim if the service member is on chargeable leave (more than merely off duty), regardless of location. Brooks v. United States, 337 U.S. 49 (1949) (off-post); Elliott v. United States, 13 F.3d 1555, (11th Cir.), vacated, reh'g en banc granted, 28 F.3d 1076, aff'd per curiam, 37 F.3d 617 (1994) (on-post).

(6) If analysis of the three factors would indicate the injuries did not occur "incident to service," but litigating the case would still involve the court in military matters and carry the potential to adversely effect discipline, Feres may still bar the claim. United States v. Shearer, 473 U.S. 52 (1985); Sanchez v. United States, 878 F.2d 633 (2d Cir. 1989).

(7) Feres bar also extends to:

(a) Commissioned officers of the Public Health Service.

(b) National Guardsmen when engaged in Guard activities.

(c) Third party claims for contribution and indemnity arising out of injuries sustained by a plaintiff whose direct action against the United States is barred by *Feres*.

(d) Foreign military members in the United States for training or service with United States forces.

(e) Service academy cadets.

(8) Feres bars not only the direct action by the service member, but also any derivative action arising out of the service member's injuries. Stephenson v. Stone, 21 F.3d 159 (7th Cir. 1994); Scales v. United States, 685 F.2d 970, reh'g denied, 691 F.2d 502 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983); Persons v. United States, 925 F.2d 292 (9th Cir. 1991).

(9) Feres does not bar an infant plaintiff's suit based upon negligent medical treatment of his then pregnant active duty mother. Ortiz v. U.S. ex rel. Evans Army Cmty. Hosp., 786 F.3d 817, 818 (10th Cir. 2015) (claim arising from child's in utero brain injury were derivative of Air Force officer's injury and thus Feres barred); Del Rio v. United States, 833 F.2d 282 (11th Cir. 1987); Romero v. United States, 954 F.2d 223 (4th Cir. 1992). This is the prevailing view. There are some cases contra. Scales v. United States, 685 F.2d 502, reh'g denied, 691 F.2d (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983).

(10) Family members of service members. Family members of active duty service members who are personally injured by Government negligence are not barred by Feres even if their injuries are sustained while using privileges or benefits available to them because of their sponsors' status. Portis v. United States, 483 F.2d 670 (4th Cir. 1973). The service member can also recover on derivative claims arising out of injuries to dependents. Phillips v. United States, 508 F. Supp. 544 (D.S.C. 1981).

(11) Veterans/retirees.

(a) If the tort occurs after discharge, Feres will not bar the claim.

(b) The issue is often whether the alleged tort is separate and distinct from any acts occurring before discharge. United States v. Stanley, 483 U.S. 669 (1987) (no

post-discharge injury); United States v. Brown, 348 U.S. 110 (1954) (post-discharge injury); M.M.H. v. United States, 966 F.2d 285 (7th Cir. 1992).

V. THE FTCA SUBSTANTIVE ANALYSIS.

A. Choice of Law - What Law Applies?

1. The FTCA provides that the law of the state where the act or omission occurred determines the liability of the United States. 28 U.S.C. § 1346(b).

2. The "law of the state" is the whole law, including the state's choice of law rules. Richards v. United States, 369 U.S. 1 (1962).

B. The Basis of the Claim - Is There a Remedy for the Relief Being Sought?

1. Cause of Action.

a. The substantive tort law of the state determines whether the plaintiff has a valid cause of action. Henderson v. United States, 846 F.2d 1233 (9th Cir. 1988). See also United States v. Olson 546 U.S. 43 (2005) (FTCA waives federal government's immunity only where local law would make a private person liable in tort, not where local law would make a state or municipal entity liable, even when uniquely governmental functions are at issue.)

b. If the state law does not permit recovery under the circumstances, the United States will not be liable.

(1) No liability for failure to warn when there is no duty to warn under state law. Cole v. United States, 846 F.2d 1290 (11th Cir.), cert. denied, 488 U.S. 966 (1988).

(2) No liability for serving alcohol to soldier when there is no dram shop liability under state law. Corrigan v. United States, 815 F.2d 954 (4th Cir. 1987), cert. denied, 484 U.S. 926 (1987).

(3) Proximate cause limitations in state law applicable to FTCA suit. Skipper v. United States, 1 F.3d 349 (5th Cir. 1993), cert. denied, 510 U.S. 1178 (1994).

(4) No liability for false arrest unless provided for in state law. Bernard v. United States, 25 F.3d 98 (2d Cir. 1994).

(5) No liability under a state's *res ipsa loquitur* doctrine if plaintiff cannot prove shared responsibility. Creekmore v. United States, 905 F.2d 1508 (11th Cir. 1990).

c. The United States may claim the benefit of state limitations on the liability of private parties.

(1) State recreational use statute immunized United States from liability for injuries sustained by recreational user of Federal land. Mansion v. United States, 945 F.2d 1115 (9th Cir. 1991); Hegg v. United States, 817 F.2d 1328 (8th Cir. 1987). See also Lingua v. United States, 801 F.Supp.2d 320 (M.D.Pa. 2011) (Pennsylvania Recreation Use of Land and Water Act immunized United States from liability in national recreation area.)

(2) Alaska's Good Samaritan statute immunized the United States from liability from alleged negligence during rescue at sea. Bunting v. United States, 884 F.2d 1143 (9th Cir. 1989).

(3) State limitation on non-economic damages in professional negligence cases applied to the United States. Knowles v. United States, 29 F.3d 1261 (8th Cir. 1994), remanded, 91 F.3d 1147 (8th Cir. 1996), reh'g denied, 1996 U.S. App. LEXIS 29706; Taylor v. United States, 821 F.2d 1428 (9th Cir.), cert. denied, 485 U.S. 992 (1988); Starns v. United States, 923 F.2d 34 (4th Cir.), cert. denied, 502 U.S. 809 (1991).

d. The FTCA does not waive sovereign immunity for strict liability. Even if state law would permit recovery under a strict liability theory, the United States is immune. Laird v. Nelms, 406 U.S. 797 (1972).

e. The waiver of sovereign immunity for state negligence actions does not waive the United States' immunity for Federal constitutional torts. Castro v. United States, 775 F.2d 399 (1st Cir. 1985) (abrogated on other grounds); Boda v. United States, 698 F.2d 1174 (11th Cir. 1983).

2. Relief Sought.

a. Relief is limited to money damages. Equitable relief is not available under the FTCA.

b. Amount of recovery is limited to the amount claimed in the administrative claim unless "the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the Federal agency, or upon allegation and proof of intervening facts relating to the amount of the claim." 28 U.S.C. § 2675(b).

(1) When the new evidence or intervening facts only refine or go to the precision of the plaintiff's prognosis, an increased damage award is not appropriate. Low v. United States, 795 F.2d 466 (5th Cir. 1986). See also Tookes v. United States, 811 F.Supp.2d 322 (D.D.C. 2011) (plaintiff should have known injury stemming from alleged false imprisonment could prevent her from returning to work.)

(2) A reasonably based change in expectation as to the severity and permanence of the injuries will support an award greater than claimed in the administrative claim. Spivey v. United States, 912 F.2d 80 (4th Cir. 1990); Cole v. United States, 861 F.2d 1261 (11th Cir. 1988).

c. Punitive damages are not payable under the FTCA. 28 U.S.C. § 2674.

C. Status of the Tortfeasor - Who Caused the Injury or Damage?

1. The negligent actor must be a Federal employee acting within the course and scope of Federal employment. 28 U.S.C. § 2679(b)(1).

2. Federal law determines whether a given individual is a Federal employee.

a. The general test used by the courts to determine if an individual is an employee of the Government is the "right to control the details of the day-to-day performance of duty" analysis set forth in Restatement (Second) of Agency § 220 (1958).

b. Examples.

(1) Local Federally funded community action agency is not a Federal enterprise. United States v. Orleans, 425 U.S. 807 (1976).

(2) Local jail contracted to temporarily house Federal prisoners; jail employees were not "Federal employees" under the FTCA. Logue v. United States, 412 U.S. 521 (1973).

(3) Private physicians designated as Aviation Medical Examiners by the Federal Aviation Administration, are not Federal employees. Leone v. United States, 910 F.2d 46 (2d Cir.), cert. denied, 499 U.S. 905 (1991).

c. Independent contractors.

(1) Not Federal employees. 28 U.S.C. § 2671. Williams v. United States, 50 F.3d 299 (4th Cir. 1995) (U.S. Government was not liable for actions of contract janitorial service employees in building leased by United States). See also the ten-factor analysis used in Peacock v. United States, 597 F.3d 654 (5th Cir. 2012).

(2) Although independent contractors are specifically excluded from the statutory definition of Federal employees, the Government may be liable if the United States has authority "to control the detailed physical performance of the contractor" and supervise its day-to-day operations. Bird v. United States, 949 F.2d 1079 (10th Cir. 1991) (nurse anesthetist hired from placement service to serve in Federal hospital was a Federal employee).

3. The Federal employee must be acting within the course and scope of Federal employment.

a. The applicable state tort law determines whether the employee was acting within the course and scope of Federal employment. Williams v. United States, 350 U.S. 857 (1955); Taber v. Maine, 67 F.3d 1029 (2d Cir. 1995), rev'ing, 45 F.3d 598 (2d Cir. 1995).

b. Differences in the laws of the various states will produce different results in factually similar cases.

(1) Violation of base regulations requiring residents to control their dogs was not within the scope of employment; therefore, the United States could not be held liable for a dog bite. Chancellor v. United States, 1 F.3d 438 (6th Cir. 1993); Piper v. United States, 887 F.2d 861 (8th Cir. 1989); Nelson v. United States, 838 F.2d 1280 (D.C. Cir. 1988).

(2) Violation of base regulations requiring residents to control their dogs was within the scope of employment; therefore, the United States could be held liable for a dog bite. Lutz v. United States, 685 F.2d 1178 (9th Cir. 1982).

c. Statutory Immunity for Individuals. The Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act) amended the FTCA and provides absolute immunity from state and common law torts for Federal employees acting within the scope of employment.

(1) The FTCA is the exclusive remedy for state law torts committed by Federal employees within the scope of employment. Wright v. Park, 5 F.3d 586 (1st Cir. 1993).

(2) The Westfall Act (the Act) applies only to state and common law torts.

(3) Before the Act applies, the U.S. Attorney must certify that the Federal employee was acting within the scope of employment.

(4) After certification, the suit is removed to Federal court, the United States is substituted as the defendant, and the suit becomes an FTCA cause of action against the Government. Dillon v. State of Mississippi Military Dep't, 23 F.3d 915 (5th Cir. 1994).

(5) Attorney General certification/motion to substitute. U.S. Attorney's decision is subject to review. DeMartinez v. Lamagno, 515 U.S. 417 (1995).

D. Is There a Statutory Bar to Liability?

1. Even if the claimant clears all of the foregoing obstacles, the claim may still be barred by one of the 13 exceptions listed in the FTCA. 28 U.S.C. § 2680.

2. Discretionary function. 28 U.S.C. § 2680(a).

a. The statute actually sets forth two separate exceptions under this section.

(1) "Due care". Sovereign immunity is not waived for any claim based upon an act or omission of a Federal employee exercising due care in the execution of a statute or regulation, whether or not the statute or regulation is valid.

(2) "Discretionary function." Sovereign immunity is not waived for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or employee, whether or not the discretion involved is abused.

b. Provision 1. Due care exclusion of liability applies primarily to Government employees in the execution of statutes or regulations.

(1) If a statute or regulation mandates particular conduct, and the employee follows the mandate, the conduct is deemed in furtherance of U.S. policy and the Government will not be liable. United States v. Gaubert, 499 U.S. 315 (1991), citing, Dalehite v. United States, 346 U.S. 15 (1953).

(2) Federal law determines whether the Government employee exercised due care in the execution of the Federal statute or regulation. Hydrogen Technology Corp. v. United States, 831 F.2d 1155 (1st Cir. 1987), cert. denied, 486 U.S. 1022 (1988). Contra Downs v. United States, 522 F.2d 990 (6th Cir. 1975).

c. Provision 2. Discretionary function two-part test. Before the exception applies:

(1) The act must involve an element of judgment or choice. Berkovitz v. United States, 486 U.S. 531 (1988).

(2) The judgment must be the kind that the discretionary function exception was designed to shield.

(3) The exception applies even when decisions are negligently made or discretion is abused.

3. Intentional torts exception. 28 U.S.C. § 2680(h).

a. The FTCA does not waive sovereign immunity for: assault and battery; false arrest; libel; slander; misrepresentation; and interference with contract rights.

b. Exception to the assault and battery and false arrest exceptions.

(1) FTCA does waive sovereign immunity for assault, battery, and false arrest when committed by Federal law enforcement officers.

(2) “Federal law enforcement officer” is defined as an officer of the United States "who is empowered by law to execute searches, to seize evidence, or to make arrests for violation of Federal law."

(a) Military police are Federal law enforcement officers for FTCA purposes. Kennedy v. United States, 585 F. Supp. 1119 (D.S.C. 1984).

(b) Parole officers are not Federal law enforcement officers. Wilson v. United States, 959 F.2d 12 (2d Cir. 1992).

(c) Post Exchange security guards are not Federal law enforcement officers. Solomon v. United States, 559 F.2d 309 (5th Cir. 1977).

c. All intentional torts are not barred as a matter of law.

(1) The intentional tort exception will apply only if the conduct relied on to establish the alleged tort is substantially the same as that required to establish one of the specifically barred torts. Sheehan v. United States, 896 F.2d 1168, modified, 917 F.2d 424 (9th Cir. 1990).

(2) Intentional infliction of emotional distress is not barred by the intentional torts exception. Truman v. United States, 26 F.3d 592 (5th Cir. 1994); Santiago-Ramirez v. Secretary of Dep't of Defense, 984 F.2d 16 (1st Cir. 1993); Kohn v. United States, 680 F.2d 922 (2d Cir. 1982); Gross v. United States, 676 F.2d 295 (8th Cir. 1982); Sheehan v. United States, 896 F.2d 1168 (9th Cir. 1990), modified, 917 F.2d 424 (9th Cir. 1990).

4. Combatant activities exception. 28 U.S.C. § 2680 (j).

a. The United States is not liable for any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

b. There need be no formal declaration of war for the exception to apply. Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992), cert. denied; 508 U.S. 960 (1993); Rotko v. Abrams, 338 F. Supp. 46 (D. Conn. 1971), aff'd, 455 F.2d 992 (2d Cir. 1972); Morrison v. United States, 316 F. Supp. 78 (M.D. Ga. 1970).

5. Overseas exception. 28 U.S.C. § 2680 (k).

a. Congress did not want the liability of the United States determined by the laws of a foreign country. Therefore, claimants who have been injured by the acts or omissions of Federal employees in foreign countries have no judicial remedy against the United States.

b. If the injury occurred in a foreign country but the negligent act or omission occurred in the United States, the claim is not barred. In re Paris Air Crash, 399 F. Supp. 732 (C.D. Cal. 1975).

c. If the land in question is outside the U.S. but not subject to the sovereignty of another nation, the claim is still barred. Smith v. United States, 507 U.S. 197 (1993) (Antarctica).

FEDERAL LITIGATION COURSE

TAB I

INDIVIDUAL LIABILITY OF FEDERAL OFFICIALS & EMPLOYEES

I. Introduction

A. Overview - military service materially different from civilian employment

1. Different rules govern
2. Emphasis on preserving good order and discipline of Armed Forces

B. Constitutional structure - Constitution grants exclusive responsibility for Armed Forces to legislative and executive branches. Courts have no role in governance of Armed Forces.

1. Congress shall have power to raise and support Armies;
2. to provide and maintain a Navy;
3. to make rules for the government and regulation of the land and naval forces (U.S. Const. art. I, § 8, cls. 12,13,14).
4. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States (U.S. Const. art. II , §2, cl. 1).

C. Types of claims arising from military service

1. FTCA
2. Individual capacity claims - *Bivens*; 42 U.S.C. § 1983
3. Statutory Claims - Title VII; ADA; ADEA, FLSA
4. State law claims - negligence

II. Representation Issues

A. Who Do We Represent

1. Representation governed by 28 C.F.R. § 50.15
   a. scope of employment
   b. interest of United States

B. Overview of Components of Armed Forces

1. Active-Duty Armed Forces - active duty military are always federal employees for representation purposes

    a. 28 U.S.C. § 2671 - employee of the government includes members of the military or naval forces of the United States

    b. Army, Navy, Air Force, Marine Corps, Coast Guard

    c. Title 10 U.S.C. - Armed Forces

2. Reserves - Reservists are federal employees when in military status - Drill, Annual Training

    a. Reserves: Army Reserve; Navy Reserve; Air Force Reserve; Marine Corps Reserve; Coast Guard Reserve

    b. Governed by Title 10 U.S.C. - Armed Forces

3. National Guard - overview

    a. National Guard is joint State/Federal military organization

        i. Congress shall have power to provide for organizing, arming, and disciplining the Militia . . . reserving to the States respectively, the appointment of the officers and the authority of training the Militia according to the discipline prescribed by Congress. U.S. Const. art. I, § 8, cl. 16.

        ii. Title 32 U.S.C. National Guard

    b. 54 Separate National Guards (50 states, D.C., Puerto Rico; Guam, U.S. Virgin Islands)

    c. Army National Guard; Air National Guard

    d. Established 1636 - oldest component of Armed Forces

C. National Guard Representation - Guard soldiers and airmen are federal employees except when performing State active duty.

    1. 28 U.S.C. § 2671 - employee of the government includes members of the National Guard when engaged in training or duty under section 115, 316, 502, 503, 504, 505 of Title 32.

    2. Historic - *Maryland v. United States (ex rel Levin)*, 381 U.S. 41, 53

(1965) - Supreme Court holds that National Guard soldiers are State not federal employees for FTCA purposes.

3. 1981 Amendment to Federal Tor Claims Act, PL 97-124, December 20, 1981, 95 Stat. 1666 - Congress legislatively overrules holding in Maryland by amending FTCA's definition of federal employee (28 § 2671) to specifically include National Guard soldiers when engaged in training or duty under Title 32.

    a. Legislative history shows Congress's recognition that "there is substantial risk of personal liability by National Guard personnel engaged in federal training activity." H.R. Rep. 97-384, 1981 U.S.C.C.A.N 2692. Intent of amendment was to provide the National Guard the same coverage that exists for the active Armed Forces and its other reserve components.

    b. § 2671 definition of federal employee controls for representation purposes.

    c. Enumerated 32 U.S.C. sections cover all National Guard military training except State active duty.

        i 32 U.S.C. § 502 - Weekend Drill
        ii. 32 U.S.C. § 503 - Annual Training
        iii.32 U.S.C. § 505 - Schools

4. National Guard Technicians - Full-time Federal employees assigned to State military departments who are required to maintain membership in the National Guard as a condition of their federal employment.

    a. National Guard Technicians Act of 1968 - 32 U.S.C. § 709

        i. Technicians are employees of the United States - 32 U.S.C. § 709 (e)

5. Active Guard Reserve (AGR) - full-time Title 32 active-duty members of National Guard.

III. Intramilitary Immunity

A. *Feres v. United States,* 340 U.S. 135, 138 (1950).

1. 3 consolidated negligence claims against United States - barracks fire, medical malpractice claims.

2. 28 U.S.C. § 1346(b) - facially broad waiver of sovereign immunity.

3. 28 U.S.C. § 2671 - contemplates that U.S. will sometimes be responsible for negligence of military personnel by including members of military and naval forces in FTCA's definition of federal employees.

4. 28 U.S.C. § 2680(j) - FTCA exception for "any claim arising from the combatant activities of the military or naval forces or the Coast guard during time of war."

5. 28 U.S.C. § 2674 - private party analogue - United States shall be liable to the same extent as a private individual under like circumstances.

    a. No private party analogue to soldier - no American law has ever permitted a soldier to recover for negligence against either his superior officers or the government he serves.

        i. FTCA intended to waive sovereign immunity for recognized causes of action and was not intended to visit the government with novel and unprecedented liabilities.

6. Relationship between the Government and members of its Armed Forces is distinctively federal in character.

7. Availability of uniform system of compensation for injury or death arising from military service.

8. Incident to military service test - Supreme Court holds that the FTCA did not waive sovereign immunity for injuries to soldiers where the injuries "arise out of or are in the course of activity incident to service." 340 U.S. at 141-142.

B. *Feres* Progeny

1. *United States v. Shearer*, 473 U.S. 52 (1985) - off-base murder of private by another soldier. Mother alleges negligence by Army in supervision of murderer.

    a. "*Feres* seems best explained by the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits . . . were allowed for negligent orders given or negligent acts committed in the course of military duty." *Shearer*, 473 U.S. 52, 57 (1985) (internal quotation marks and citations omitted).

b. Situs of injury not nearly as important as whether the suit requires the civilian court to second-guess military decisions and whether the suit might impair essential military discipline. *Id.* at 57.

c. Bars claims of the *type* that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.

2. *Stencel Aero v. United States*, 431 U.S. 666 (1977) - National Guard pilot injured when ejecting from F-100 fighter aircraft sues manufacturer of ejection seat. Manufacturer brings cross-claim for indemnification against United States.

a. Held - third party indemnification action barred when direct action by soldier barred.

b. Reasoning - where case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party. At issue would be the degree of fault on the part of the Government's agents and the effect upon the service member's safety. 431 U.S. at 673.

c. Key point - trial would, in either case, involve second-guessing military orders and would often require members of the Armed Services to testify in court as to each other's decisions and action. *Id.*

3. *United States v. Johnson*, 481 U.S. 681 (1987) - Coast Guard helicopter crashes during rescue mission killing all on board due to alleged negligence of civilian FAA air traffic controllers.

a. Held - *Feres* doctrine has been applied consistently to bar all suits on behalf of service members against the Government based upon service related injuries. Military status of alleged tortfeasor immaterial to application of doctrine. 481 U.S. at 687-88.

b. Reasoning- In 40 years since *Feres* decision Court has never deviated from the standard that soldiers cannot bring tort suits against the Government for injuries that "arise out of or are in the course of activity incident to service." *Id.* Congress has not changed standard despite ample opportunity.

c. Key Points - *Johnson* reaffirms continued vitality of all three grounds supporting intramilitary immunity. Court emphasizes that because injury arose during performance of military duty, "the potential that this suit could implicate military discipline is substantial." 481 U.S. at 691-92.

i. Scalia dissent.

B. *Chappell v. Wallace*, 462 U.S. 296, 303-04 (1983) - *Bivens* suit by Navy enlisted sailors against their commander, superiors officers, and NCO's alleging racial discrimination in duty assignments, performance evaluations, and disciplinary actions.

1. Individual capacity suit - generally look to military status of both plaintiff and defendant

2. Explicit recognition that *Feres* guides analysis in *Bivens* suit arising from military service although United States not a party. 462 U.S. at 299.

a. The special status of the military has required, Congress has created and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel. The special nature of military life, the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command. Here, as in *Feres*, we must be concerned with the disruption of the peculiar and special relationship of the soldier to his superiors that might result if the soldier were allowed to hale his superiors into court. 462 U.S. at 303-04 (internal citations and quotation marks omitted).

3. Holding - taken together, the unique disciplinary structure of the military establishment and Congress' activity in the field constitute "special factors" which dictate that it would be inappropriate to provide enlisted personnel a *Bivens*-type remedy against their superior officers. Id. at 304.

C. *United States v. Stanley*, 483 U.S. 669, 679-84 (1987) - soldier unwittingly subjected to secret LSD experiment brings *Bivens* claims against known and unknown individual defendants.

1. Court explicitly adopts arising from or incident to military service test as controlling in *Bivens* as well as FTCA actions.

    a. We see no reason why our judgment in the *Bivens* context should be any less protective of military concerns than it has been with respect to FTCA suits.

    b. Officer-subordinate relationship present in *Chappell* not necessary for application of intramilitary immunity.

2. Key Point - A test for liability that depends on the extent to which particular suits would call into question military discipline and decision making would itself require judicial inquiry into, and hence intrusion upon, military matters. Whether a case implicates those concerns would often be problematic, raising the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands. Even putting aside the risk of erroneous judicial conclusions (which would becloud military decision making), the mere process of arriving at correct conclusions would disrupt the military regime. 483 U.S. at 682-83.

    a. The arising from or incident to military service test, by contrast, provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters. *Id.* at 683.

IV. Nonjusticiable Military Issues

A. *Orloff v. Willoughby*, 345 U.S. 83 (1953) - *Habeas Corpus* petition filed by physician drafted in doctor's draft who was denied commission in Medical Corps and instead assigned duties as private in medical lab because he refused to answer questions concerning Communist affiliations.

1. Military appointments not subject to judicial review - the commissioning of officers in the army is a matter of discretion within the province of the President as Commander in Chief. "Whether Orloff deserves appointment is not for judges to say and it would be idle, or worse, to remand this case to the lower courts on any question concerning his claim to a commission." 345 U.S. at 92.

2. Duty assignments not subject to judicial review - "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere in legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." 345 U.S. at 94.

B. *Gilligan v. Morgan*, 413 U.S. 1 (1973) - Complaint for declaratory and injunctive relief filed by Kent State University students seeking judicial evaluation of appropriateness of the training and weaponry of the Ohio National Guard and judicial supervision of future training and operations of National Guard.

1. Training, supervision, organization, equipping, and employment of Armed Forces nonjusticiable.

2. The Guard is an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war.

3. "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible - as the Judicial Branch is not - to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." 413 U.S. at 10.

C. *Aktepe v. United States*, 105 F.3d 1400, 1402-04 (11th Cir. 1997) - accidental firing of two live missiles from a United States Navy warship during a North Atlantic Treaty Organization (NATO) training exercise. The missiles struck a Turkish Navy warship resulting in several deaths and numerous injuries. *Id*. at 1402. The survivors of the Turkish sailors killed and wounded in the training accident filed wrongful death and personal injury claims against the United States under the Public Vessels Act, 46 U.S.C. App. §§ 781-790, and the Death on the High Seas Act, 46 U.S.C. App. §§ 761-768. .

1. Relying in large part upon *Gilligan*, the Eleventh Circuit holds that these tort claims present nonjusticiable political questions. *Aktepe*, 105 F.3d at 1402-04.

V. Remedial Statutes Generally Do Not Apply to Armed Forces

A. Absent an express directive from Congress, statutory remedies of general application such as Title VII, the Americans with Disabilities Act (ADA), 42 U.S.C. § 1201 *et seq*., and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, do not apply to uniformed members of the Armed Forces.

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., does not apply to uniformed members of the Armed Forces. *Spain v. Ball*, 928 F.2d 61, 62 (2nd Cir. 1991); *Randall v. United States*, 95 F.3d 339, 343 (4th Cir. 1996); *Coffman v. Michigan*, 120 F.3d 57, 59 (6th Cir. 1997); *Kawitt v. United States*,

842 F.2d 951, 953 (7th Cir. 1988); *Hupp v. Department of the Army*, 144 F.3d 1144, 1147 (8th Cir. 1998); *Frey v. California*, 982 F.2d 399, 404 (9th Cir. 1993); *Stinson v. Hornsby*, 821 F.2d 1537, 1539-40 (11th Cir. 1987).

2. ADA and ADEA do not apply to uniformed members of the Armed Forces. *Coffman v Michigan*, 120 F.3d 57, (6th Cir. 1997)(holding that Title VII, the Rehabilitation Act, and the ADA do not apply to National Guard soldiers); *Spain v. Ball*, 928 F.2d 61, 62 (2nd Cir. 1991)(holding that Title VII and ADEA do not apply to uniformed members of the Armed Forces).

3. Bar applies to applicants for military positions as well as current members of Armed Forces.

   a. *Spain v. Ball*, 928 F.2d 61, 62 (2nd Cir. 1991), - unsuccessful applicant for a commission in the United States Navy brought Title VII and ADEA claims. The Second Circuit held that "Spain was applying for an officer position with the Navy, a uniformed position. Accordingly, he cannot allege any facts sufficient to support a Title VII claim . . . and his claims should therefore have been dismissed with prejudice." *Id*. *See also, Johnson v. Alexander*, 572 F.2d 1219, 1222-24 (8th Cir. 1978)(holding that "neither Title VII or its standards are applicable to persons who enlist or apply for enlistment in any of the Armed Forces of the United States); *Moore v. Pennsylvania Department of Military and Veterans Affairs*, 216 F.Supp.2d. 446, 452 (E.D. Pa. 2002)(holding that "Title VII provides the same immunity from suit by enlisted personnel or applicants for enlistment in the National Guard that is provided to federal armed forces.)"

VI. . 42 U.S.C. § 1983 Claims Against National Guard Soldiers

A. The Circuit Courts have unanimously applied the doctrine of intramilitary immunity to bar all service-related § 1983 claims against National Guard officers. *Jones v. New York State Division of Military and Naval Affairs*, 166 F.3d 45, 51 (2nd Cir. 1999) (collecting cases); *Wright v. Park*, 5 F.3d 586, 591 (1st Cir. 1993); *Jorden v. National Guard Bureau*, 799 F.2d 99, 106-108 (3rd Cir. 1986); *Holdiness v. Stroud*, 808 F.2d 417, 423 (5th Cir. 1987); *Knutson v. Wisconsin Air National Guard*, 995 F.2d 765, 770 (7th Cir. 1993); *Uhl v. Swanstrom*, 79 F.3d 751, 755-56 (8th Cir. 1996); *Wood v. United States*, 968 F.2d 738, 739 (8th Cir. 1992); *Bowen v. Oistead*, 125 F.3d 800, 804-05 (9th Cir. 1997); *Martelon v. Temple*, 747 F.2d 1348, 1350-51 (10th Cir. 1984).

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